APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 99-10640

JERRY L. LYONS, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellant,

v.

GEORGIA-PACIFIC CORPORATION SALARIED EMPLOYEES RETIREMENT PLAN, GEORGIA-PACIFIC CORPORATION,

Defendants-Appellees.

Aug. 11, 2000

Appeal from the United States District Court for the Northern District of Georgia.

Before CARNES, BARKETT and WILSON, Circuit Judges.

CARNES, Circuit Judge:

This is an Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et. seq.*, case in which we are called upon to decide issues about how to calculate a consensual, lump sum payout in a front-loaded, defined benefit, cash balance pension plan with fixed interest credits. The principal issue is whether such a payout must be calculated using the present value methodology set out in

Treasury Regulations 1.411(a)-11 and 1.417(e)-1,[1] the former of which the district court held to be invalid. *See Lyons v. Georgia-Pacific Corp. Salaried Employees Retirement Plan*, 66 F.Supp.2d 1328, 1336 (N.D.Ga.1999). For reasons we will explain, we are convinced that those Treasury regulations are valid and control the calculation of consensual lump sum payouts, at least insofar as they apply to distributions that occurred prior to the effective date of the amendments that the Retirement Protection Act of 1994 made to ERISA § 203(e), 29 U.S.C. § 1053(e).

I. BACKGROUND

A. The Plan

There are two basic types of pension plans, defined contribution plans and defined benefit plans. A defined contribution plan provides for each participant a separate account to which contributions are made, with the retirement benefit depending on the amounts that have been contributed to the account and the investment gains and losses on the amounts in the account. *See* ERISA § 3(34), 29 U.S.C. § 1002(34); *see also* Barbara J. Coleman, *Primer on Employee Retirement Income Security Act* 32-33 (4th ed.1993). No specific, defined retirement amount is promised under a defined contribution plan. *See id.* The plan involved in this case is not of that type.

Instead, this case involves a defined benefit plan, which is one where the retirement benefit is expressed as a certain annual amount to be paid by the employer over the employee's lifetime, beginning at the employee's retirement. *See* ERISA § 3(35), 29 U.S.C. § 1002(35). Such a plan promises a specific defined benefit the calculation of which is

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[1] Treasury Regulations 1.411(a)-1 and 1.417(e) were promulgated in 1988 and were later amended in 1994. All of our references to these regulations refer to the 1988 versions.

not dependent upon investment gains or losses. *See* Coleman, *supra*, at 32-33. There are subtypes of defined benefit plans. The one involved in this case is a cash balance defined benefit plan.

At all times relevant to this case, the Georgia-Pacific Corporation Salaried Employees Retirement Plan ("the Plan") has been a cash balance plan, which is a defined benefit plan that determines benefits for each employee by reference to the amount of the employee's hypothetical account balance. An employee's hypothetical account balance is credited by the employer with hypothetical allocations and hypothetical interest earnings determined under a formula set forth in the Plan. The hypothetical allocations and hypothetical earnings are designed to resemble actual contributions and earnings under a defined contribution plan. *See* I.R.S. Notice 96-8, 1996-1 C.B. 359, 1996 WL 17901. One benefit of cash balance plans is that they "allow younger workers to take a larger benefit with them when changing jobs." *Give Employees Meaningful Information When Pensions are Changed to Cash Balance Plans, Says Actuary*, PR Newswire, May 7, 1999.[2]

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[2] The first cash balance plan was introduced in 1985 for BankAmerica Corporation. *See* Lindsay Wyatt, *"Hybrid" Plans Fit Evolving Workforce*, Pension Management, March, 1996; *see also* Richard D. Brown, *An Introduction to Basic Employee Retirement Benefits*, 340 P.L.I. 7, 82 (1993) ("The Cash Balance Plan is a modified form of defined benefit pension plan which was introduced by the actuarial firm of Kwasha Lipton in the mid-1980's."). Since then, many large companies such as BellSouth Corp., Xerox Corp., Countrymark Cooperative, and Blue Cross/Blue Shield of New Jersey have adopted these plans. *See* Wyatt, *supra*. More than 300 companies, with hundreds of billions of dollars in pension assets, have switched from traditional pension plan formulas to cash balance plans. *See Q*-and-*A*: *What You Need to Know About Today's "Cash-Balance" Plans*, Payroll Manager's Report, Feb. 2000, at 3.

Section 3.1 of the Plan requires that a hypothetical bookkeeping account—the Personal Account—be established and maintained for each participant. Each month the participant's Personal Account is credited with (1) *service credits*, a specified percentage of the participant's compensation for that month; and (2) *interest credits*, which are derived by multiplying the hypothetical balance in the Personal Account by the Periodic Adjustment Percentage. That adjustment percentage is computed under the Plan by determining the Pension Benefit Guaranty Corporation ("PBGC")[3] twelve-month "immediate" annuity interest rate for the preceding year, then adding .75% to that rate, and, lastly, dividing this composite annual rate by 12. Under ERISA the Plan could have used an adjustment percentage equal to the prescribed maximum PBGC rate, but instead it used a higher rate. If the Plan had not used a higher adjustment rate, the dispute in this case would never have arisen, but more about that later.

Although service credits cease when the participant leaves employment, interest credits continue until the participant's Benefit Commencement Date. That is why the Plan is said to be a "front-loaded" interest credit plan, defined as one in which "future interest credits to an employee's hypothetical account balance are not conditioned upon future service." I.R.S. Notice 96-8 at 4. In the case of an annuity form of benefit under this Plan, the Benefit Commencement Date is the date that the annuity is payable. Thus, if the participant is entitled to an annuity that is payable at age 65, under the

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[3] The Pension Benefit Guaranty Corporation is "a wholly owned United States Government corporation . . . modeled after the Federal Deposit Insurance Corporation," whose Board of Directors "consists of the Secretaries of the Treasury, Labor, and Commerce." *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 636-37, 110 S.Ct. 2668, 2671, 110 L.Ed.2d 579 (1990). It "administers and enforces Title IV of ERISA." *Id.* at 637, 110 S.Ct. at 2671.

front-loaded aspect of the Plan, interest credits continue to accrue until age 65, even if the participant separates from employment with Georgia-Pacific before age 65.

Under the Plan a participant may elect, under certain specified conditions, to receive his accrued pension benefits in an optional lump sum form, payable immediately, rather than as an annuity commencing at age 65. If the participant elects this option, the amount payable under the Plan is a single sum equal to the amount in the participant's Personal Account (the hypothetical bookkeeping account).[4] It is this feature of the plan—the provision that the lump sum payout is the amount in the Personal Account at the time—that is at issue in this case.

B. Facts

From 1965 until 1990, Jerry L. Lyons was employed as a paper inspector and paper tester for Great Northern Corporation. In 1990, Georgia-Pacific Corporation acquired Great Northern. As a result of the acquisition, Lyons became an employee of Georgia-Pacific, Great Northern's pension plan was merged with the Georgia-Pacific Salaried Employees Retirement Plan (which we are calling "the Plan"), and Lyons became a participant of it.

On January 5, 1991, Lyons left employment at Georgia-Pacific. In accordance with Article 4 of the Plan, Lyons was entitled to a vested benefit, because he had worked for Georgia-Pacific and Great Northern for at least five years. Pursuant to section 1.1 of the Plan, Lyons' accrued pension benefit was an annuity commencing at age 65. In November 1992, Lyons elected to receive his accrued pension benefit in

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[4] Under the Plan at Section 6.4(a), "Option C" is:

> A single lump sum payment equal to the amount credited to the Participant's Personal Account as of the end of the month preceding his Benefit Commencement Date.

the optional lump sum form, payable immediately, as he was permitted to do under section 6.4(a) of the Plan. Consistent with the Plan's payout provision for lump sums, Georgia-Pacific distributed to Lyons in January of 1993 a lump sum equal to the amount credited to his Personal Account—$36,109.15. *See Lyons*, 66 F.Supp.2d at 1329, 1332.

Two months after receiving his lump sum, Lyons consulted with the National Center for Retirement Benefits ("NCRB")[5] and was told by it that Georgia-Pacific had distributed to him substantially less than the amount he was entitled to receive under ERISA § 203(e), *see* 29 U.S.C. § 1053(e), at least as that statutory provision had been interpreted in Treasury Regulation 1.411(a)-11 and Treasury Regulation 1.417(e)-1.

We will discuss those Treasury regulations more later, but at this juncture it is enough to say that Georgia-Pacific did not follow them. If it had, instead of merely paying Lyons a lump sum equal to the amount credited to his Personal Account, which was $36,109.15, Georgia-Pacific would have taken the value of the annuity Lyons would have received at age 65 and discounted it to present value by using the PBGC rate.[6] That approach, following the Treasury regulations, would have yielded Lyons a lump sum payout of $49,341.83. *See Lyons*, 66 F.Supp.2d at 1332. The validity of the

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[5] The NCRB is a for-profit consulting firm that works on a contingent fee basis reviewing pension payouts on behalf of individual participants and advocating for them at the administrative level. *See Senate Committee Holds Hearing on Pension Benefit Miscalculations*, Pension & Benefits Week Newsletter (RIA Group), June 23, 1997. Where its administrative representation proves unsuccessful, the NCRB has been known to refer cases to attorneys for class action lawsuits. *See Mathews v. Sears Pension Plan*, No. 95 C 1988, 1996 WL 199746, at *5 (N.D.Ill. April 23, 1996).

[6] At that time the PBGC rate was approximately 4.5 percent. *See Lyons*, 66 F.Supp.2d at 1336.

Treasury regulations is thus a question worth $13,232.68 to Lyons.[7]

C. Procedural History

In a letter dated March 18, 1996, the NCRB, acting on behalf of Lyons, advised Georgia-Pacific that Treasury Regulation 1.417(e)-1 requires a minimum lump sum payable from a defined benefit plan to be no less than the present value of the participant's normal retirement benefit; and that the present value of Lyons' normal retirement benefit exceeded the amount in his Personal Account, which was the amount he was paid. The NCRB's letter requested that Georgia-Pacific recalculate Lyons' benefit in accordance with Treasury Regulation 1.417(e), and pay Lyons the shortfall.

Georgia-Pacific responded to the NCRB on April 17, 1996, taking the position that: the Plan is a "special" form of defined benefit plan known as a "cash balance plan;" IRS Notice 96-8 notes that cash balance plans define benefits for each employee by reference to a hypothetical account balance; most cash balance plans permit the distribution of an employee's accrued benefit in the form of a single sum equal to the employee's hypothetical account balance; Lyons' "lump sum distribution was not calculated with reference to the present value of a normal retirement benefit;" and instead, the amount distributed to Lyons was the amount credited to his Personal Account.

On April 14, 1997, Lyons, on behalf of himself and other similarly situated persons, filed a class action complaint against Georgia-Pacific and the Plan (collectively "Georgia-Pacific") alleging that the method used to pay lump sum cash distributions under the Plan violated ERISA § 203(e)(2), 29

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[7] At oral argument counsel for Lyons and the class stated that the difference for the class as a whole could be around $20 million.

U.S.C. § 1053(e)(2).[8] After Georgia-Pacific answered the complaint, the district court in September of 1997 certified a class under Rule 23(b)(3), and it defined the class as follows:

> All participants (or beneficiaries of participants) in the [Plan] (i) who received a lump sum distribution of benefits calculated at a time when such participants had a vested interest in the Plan and who (ii) received a distribution of benefits in a lump sum where (iii) at the date as of which the amount of the lump sum was calculated, the lump sum was lower than the present value, if determined using the "applicable interest rate" as defined in Internal Revenue Code Section 417(e)(3) and set forth in Treasury Regulations issued pursuant to Internal Revenue Code Section 417(e), of such participants' accrued benefit, as defined under ERISA.

Dist. Ct. Consent Order (September 29, 1997). Thereafter, the parties informed the district court that they "would prefer to seek a ruling from the Court as to the threshold issue of potential liability as to any class member before engaging in costly and time consuming discovery on issues pertaining to individual class members (or groups thereof), damages, or class membership." Dist. Ct. Consent Order (March 11, 1998). On March 11, 1998, the court accommodated the parties by entering a consent order permitting them to file summary judgment motions on that threshold liability issue. *See id.* at 1-2. The order provided that if the court's ruling on that issue did not dismiss or otherwise resolve the case, there would be a period during which the parties could "conduct discovery on issues pertaining to defenses as to claims of

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[8] Lyons has standing to sue for benefits because he was a participant in the Plan as defined by ERISA § 3(7). *See* 29 U.S.C. § 1002(7); *see generally Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115-18, 109 S.Ct. 948, 957-58, 103 L.Ed.2d 80 (1989) (interpreting the term "participant" in § 1002(7)).

individual class members or groups thereof, class membership, damages, and similar issues." *Id.* at 2.

In its ensuing motion for summary judgment, Georgia-Pacific argued that the interest rate restrictions set forth in ERISA § 203(e)(2) apply exclusively to involuntary lump sum distributions of $3,500 or less, and because Lyons and the other class members received a voluntary lump sum distribution, the statute was inapplicable. Georgia-Pacific further argued that: ERISA § 204(c)(3) and Internal Revenue Code ("IRC") § 411(c)(2) permitted distribution of the Personal Account as the entire accrued benefit; Georgia-Pacific was entitled to rely upon a good faith exception in IRS Notice 96-8 (a notice Lyons argued supports his claim); and two IRS determination letters exonerated it from liability.

On March 22, 1999, the district court granted summary judgment for Georgia-Pacific. Relying upon the statutory language cited by Georgia-Pacific, the court held that the interest rate provisions contained in ERISA § 203(e)(2) apply only for the purpose of determining if a participant must consent to the distribution of a lump sum, and there exists no legislative authority in either the language of the statute or elsewhere requiring lump sum distributions to be computed in accordance with those interest rate provisions. Therefore, the court concluded, Treasury Regulation 1.411(a)-11 was "an unreasonable construction of . . . ERISA § 203(e)." *Lyons*, 66 F.Supp.2d at 1336.

On April 2, 1999, the district court entered an amended order and final judgment, certifying the class under Federal Rule of Civil Procedure 23(b)(1)(A) and Federal Rule of Civil Procedure 23(b)(2). The court made no change in the definition of the class. Lyons timely appealed the amended order and final judgment.

II. DISCUSSION

The principal dispute in this case is about whether ERISA § 203(e), 29 U.S.C. § 1053(e), and the Treasury regulations interpreting that provision required Georgia-Pacific to calculate Lyons' lump sum benefit by determining the amount he would have received at the normal retirement age of 65 and then discounting that amount back to the present value using the PBGC discount rate. It may help to explain why that matters.

As we have said, because the Plan is "front-loaded," interest credits to a participant's Personal Account continue after separation from employment until the normal retirement date, which is specified by the Plan to be age 65. Another important feature of the Plan is that the interest credit rate it provides is higher than the maximum discount rate prescribed in ERISA § 203(e). As a result, if the Plan's interest credit rate is applied to the Personal Account balance at separation and projected forward to determine what the normal retirement benefit would be at age 65, and that benefit is then reduced to a present value using the maximum discount rate, the resulting amount will be more than what is in the Personal Account before the calculations are done.[9] The amount of the difference will be the result of two factors—the time until age 65 (the longer the time, the greater the difference) and the amount the interest credit rate exceeds the prescribed maximum discount rate (the more it does, the greater the difference). Pinning our explanation to the facts of this case, the difference of $13,232.68 between the balance in Lyons' Personal Account, which is what he was paid under the Plan, and the amount he claims he is entitled to results from the .75

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[9] Stated another way, but equally true, when a cash balance plan's interest credit rate is greater than the discount rate applied, the participant's account balance will be less than the present value of the normal retirement benefit.

percent difference between the higher interest credit rate established in the Plan and the discount rate prescribed by PBGC, carried over the time between the payout of his lump sum distribution and his normal retirement date. If the plan had pegged the interest credit rate to the prescribed maximum discount rate, there would have been no difference (regardless of the time factor), and no dispute. But it did not, so there is a dispute.

The district court held that the Treasury regulation requiring that any lump sum cash payout be calculated by applying the PBGC discount rate to the normal retirement benefit under the plan was invalid. We review that holding *de novo*. *See Lee v. Flightsafety Services Corp.*, 20 F.3d 428, 431 (11th Cir.1994).

A. The Statute, Code Sections, and Regulations

In 1974, Congress enacted ERISA, 29 U.S.C. § 1001, *et. seq.*, to protect the interests of employees by ensuring that they received the pension benefits to which they were entitled. *See* ERISA § 2, 29 U.S.C. § 1001. Ten years later, Congress enacted the Retirement Equity Act, which amended ERISA and the Internal Revenue Code to "improve the delivery of retirement benefits and provide for greater equity under private pension plans for workers and their spouses and dependents. . . ." S.Rep. No. 98-575 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547. As part of that 1984 legislation, Congress added § 203(e) to ERISA and a materially identical § 417(e) to the Internal Revenue Code. Those added provisions made the PBGC rate the maximum interest rate a plan could use to discount to present value a normal retirement benefit for purposes of determining whether the amount to be distributed exceeded the cap on involuntary lump sum distributions. After the 1984 enactment, ERISA § 203(e) read in its entirety as follows:

(e) Restrictions on mandatory distributions

(1) If the present value of any accrued benefit exceeds $3,500, such benefit shall not be treated as nonforfeitable if the plan provides that the present value of such benefit could be immediately distributed without the consent of the participant.

(2) For purposes of paragraph (1), the present value shall be calculated by using an interest rate not greater than the interest rate which would be used (as of the date of the distribution) by the Pension Benefit Guaranty Corporation for purposes of determining the present value of a lump sum distribution on plan termination.

ERISA § 203(e), 29 U.S.C. § 1053(e) (1985).[10]

Two years later, Congress enacted the Tax Reform Act of 1986. Among other things, that legislation amended ERISA § 203(e)(2) and the parallel IRC § 417(e)(3) by adding new

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[10] Although the text and the heading of the provision enacted in 1984 dealt only with calculating amounts for purposes of the restriction on mandatory distributions, the Senate Report spoke in broader terms. The pertinent part of it said:

> *For purposes of determining the present value of the participant's benefit*, the bill provides that a plan may not use an interest rate that is greater than the rate used by the Pension Benefit Guaranty Corporation (PBGC) for valuing a lump sum distribution upon plan termination.
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> *For purposes of calculating the present value of a benefit as of the date of the distribution*, the plan is required to use an interest rate no greater than the rate used by the Pension Benefit Guaranty Corporation (PBGC) in valuing a lump sum distribution upon plan termination . . .

S. Rep. No. 98-575 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 2549, 2562 (emphasis added). This legislation was not specifically tailored to cash balance plans—which did not even begin to appear until 1985, *see supra* n.2—but was instead aimed at defined benefit plans in general.

provisions relating to the calculation of the present value of an accrued benefit. One of those provisions permitted the use of a discount rate up to 120% of the applicable PBGC interest rate if the vested accrued benefit exceeded $25,000 using the PBGC rate. The other provision clarified that the present value determined under the 120% rate could not be less than $25,000. *See* Tax Reform Act of 1986, Pub.L. No. 99-514, §§ 1139(b), (c), 100 Stat. 2085.

After those amendments were made in the Tax Reform Act of 1986, this is how ERISA § 203(e) read:

> (1) If the present value of any nonforfeitable benefit with respect to a participant in a plan exceeds $3,500, the plan shall provide that such benefit may not be immediately distributed without the consent of the participant.
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> (2)(A) For purposes of paragraph (1), the present value shall be calculated—
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> (i) by using an interest rate no greater than the applicable interest rate if the vested accrued benefit (using such rate) is not in excess of $25,000,
> and
>
> (ii) by using an interest rate no greater than 120 percent of the applicable interest rate if the vested accrued benefit exceeds $25,000 (as determined under clause (i)).
>
> In no event shall the present value determined under subclause (II)[sic] be less than $25,000.
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> (B) For purposes of subparagraph (A), the term "applicable interest rate" means the interest rate which would be used (as of the date of the distribution) by the Pension Benefit Guaranty Corporation for purposes of determining the present value of a lump sum distribution on plan termination.

> (3) This subsection shall not apply to any distribution of dividends to which section 404(k) of Title 26 applies.

29 U.S.C. § 1053(e) (1990).[11] This subsection of ERISA, and the parallel Internal Revenue Code subsection, have been amended several times since the Tax Reform Act of 1986. However, none of those amendments occurred until after Lyons had elected in November of 1992 to receive his lump sum benefit and had been paid it in January of 1993. We will confine our analysis to the law applicable to Lyons and those similarly situated.[12]

Many ERISA sections have parallel provisions in the Internal Revenue Code, tax provisions that are worded in ways materially identical to the ERISA sections.[13] ERISA

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[11] In 1989, Congress enacted the Omnibus Budget Reconciliation Act of 1989. That Act made minor changes to paragraph (1) of ERISA § 203(e), but did not alter paragraph (2), which is the relevant paragraph in this case. *See* Omnibus Budget Reconciliation Act of 1989, P.L. 101-239, §§ 7682, 7891, 103 Stat. 2106, 2434, 2445.

[12] One amendment in particular, made by the Retirement Protection Act of 1994, may have altered the legal landscape insofar as Treasury Regulation 1.411(a)-11 is concerned. *See* Retirement Protection Act of 1994, P.L. 103-465, § 767(c), 108 Stat. 4809, 5039 (codified as amended at 29 U.S.C. § 1053(e)); *see also infra* 26-27. That amendment may or may not portend a different result for plan participants who received lump sum distributions after its effective date. But Lyons received his distribution before the effective date of the 1994 legislation, and is therefore not affected by it. *See infra* n. 31. When we refer throughout this opinion to those "similarly situated" to Lyons, we mean in terms of that amendment, i.e., those who received their distributions before the effective date of the Retirement Protection Act of 1994 amendment to ERISA § 203(e).

As we will discuss later, there are class representation problems relating to those who elected lump sum payouts and received them after the effective date of the Retirement Protection Act of 1994. *See infra* Part II. E.

[13] "The reason that many ERISA sections have such counterparts in the IRC is that, to encourage employers to establish pension plans, Congress

§ 203(e) is such a provision. Its tax counterparts are IRC §§ 411(a)(11) and 417(e). ERISA itself provides that Treasury regulations promulgated under IRC §§ 410(a), 411 and 412 are equally applicable to the parallel provisions of ERISA. *See* ERISA § 3002(c), 29 U.S.C. § 1202(c)[14]; 29 C.F.R. § 2530.200a-2 ("Regulations prescribed by the Secretary of the Treasury or his delegate under sections 410 and 411 of the [Internal Revenue] Code (relating to minimum standards for participation and vesting) shall apply for purposes of sections 202 through 204 [of ERISA]"); *Williams v. Cordis Corp.*, 30 F.3d 1429, 1431 n. 2 (11th Cir.1994); *see also* 26 U.S.C. § 7805 ("[T]he Secretary [of the Treasury] shall prescribe all needful rules and regulations for the enforcement" of the Internal Revenue Code.).

Because of the law discussed in the preceding paragraph, Treasury Regulation 1.411(a)-11 which interprets IRC § 411(a)(11) is equally applicable to ERISA § 203(e). That Treasury regulation, which was issued in 1988, sets forth the same discount rate restrictions as ERISA § 203(e), but goes further to clearly specify that the present value of *any* optional form of benefit (a lump sum payout is an optional form of benefit), cannot be less than the present value of the participant's normal retirement benefit. Treasury Regulation 1.411(a)-11 states in pertinent part:

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provides favorable tax treatment for plans which comply with ERISA's requirements." *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1144 n. 6 (3rd Cir.1993) (citation omitted).

[14] ERISA § 3002(c) provides:

> Regulations prescribed by the Secretary of the Treasury under [Internal Revenue Code] sections 410(a), 411 and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter.

> (a) Scope—(a)(1) In general. Section 411(a)(11) restricts the ability of a plan to distribute any portion of a participant's accrued benefit without the participant's consent. *Section 411(a)(11) also restricts the ability of defined benefit plans to distribute any portion of a participant's accrued benefit in optional forms of benefit without complying with specific valuation rules for determining the amount of the distribution. . . .*
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> * * *
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> (d) Distribution valuation requirements. In determining the present value of any distribution of any accrued benefit from a defined benefit plan, the plan must take into account specified valuation rules. For this purpose, the valuation rules are the same valuation rules for valuing distributions as set forth in section 417(e); see § 1.417(e)-1(d) . . . *This paragraph also applies whether or not the participant's consent is required under paragraphs (b) and (c) of this section.*

26 C.F.R. § 1.411(a)-11 (emphasis added). The "rules for valuing distributions as set forth in section 417(e)," which are incorporated into Treasury Regulation 1.411(a)-11(d), are the same ones set forth in ERISA § 203(e) as interpreted in Treasury Regulation 1.417(e)-1(d).[15] Those valuation rules include this one: "The present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit. . . ." Treas. Reg. § 1.417(e)-1(d). Thus, Treasury Regulation 1.411(a)-11(d) clearly provides that ERISA § 203(e), and the discount interest rates it prescribes, applies to consensual as well as non-consensual lump sum

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[15] To avoid further complicating an already complex discussion, hereinafter when we refer to Treasury Regulation 1.411(a)-11, we mean to include, where relevant, the valuation rules that are contained in Treasury Regulation 1.417(e)-1, which are explicitly incorporated by Treasury Regulation 1.411(a)-11.

distributions. That means Georgia-Pacific loses most of the battle involving the threshold liability issue, if this Treasury regulation is valid.[16]

The district court held that the interest rate restrictions set forth in ERISA § 203(e)(2), 29 U.S.C. § 1053(e)(2), apply solely for the purpose of determining whether the participant's consent is required before the accrued benefit may be distributed in the form of a lump sum. That conclusion is due to be affirmed only if we agree with the district court's holding that Treasury Regulation 1.411(a)-11 is invalid to the extent it provides to the contrary. We turn now to the critical issue of whether that Treasury regulation is due deference, and thus is to be upheld, under the *Chevron* doctrine.

B. Chevron Analysis

"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974)). For that and other reasons, agency regulations, like the one at issue here, are to be given deference "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S.Ct. at 2782. Bringing the general deference rule home to the ERISA area in particular, this Court has previously recognized that we "owe great deference to the interpretations and regulations of the Pension Benefit Guaranty Corporation ('PBGC'), the Internal Revenue Service ('IRS') and the Department of Labor, which are the administrative agencies responsible for

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[16] Georgia-Pacific has other arguments and defenses, *see infra* Part II. C. & D., but the validity of this regulation is the big issue.

enforcing and interpreting ERISA." *Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1167 (11th Cir.1988) (en banc).

In *Chevron*, the Supreme Court explained: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781. Thus, our first step is to determine whether Congress' intent, as embodied in ERISA § 203(e) at the time of the payout to Lyons in 1993, is clear that the present value interest rate restrictions contained in that legislation are applicable only to involuntary lump sum distributions. If so, then that is "the end of the matter" and the provisions of Treasury Regulation 1.411(a)-11 to the contrary are invalid.

The intent of Congress behind this part of ERISA § 203(e), at least as it existed at the time Lyons received his distribution in 1993, is anything but clear on this issue. Paragraph (1) of ERISA § 203(e) provides that an involuntary lump sum distribution may not be made when the present value of the vested accrued benefit exceeds $3,500. Paragraph (2)(A) begins with the limiting phrase, "For purposes of paragraph (1)," which seems to indicate that the restrictions on calculating present value which follow that introductory language apply only to the calculation of whether the present value exceeds the $3,500 cap on involuntary distributions contained in paragraph (1).[17] But there is a strong contrary indication in paragraph (2) as well.

Clause (i) of paragraph (2)(A) specifies the applicable discount rate to be used "if the vested accrued benefit (using such rate) is not in excess of $25,000," and clause (ii)

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[17] ERISA § 203(e), as it existed at that time, is set out in its entirety *supra* Part II. A.

specifies a different, higher, discount rate to be used "if the vested accrued benefit exceeds $25,000 (as determined under clause (i))." An additional, final sentence of paragraph (2) reiterates that "[i]n no event shall the present value determined under subclause (II) be less than $25,000,"[18] which is an amount higher than the $3,500 cap for non-consensual distributions set forth in paragraph (1). What all of these references to amounts above and below $25,000 mean is that Congress must have had something other than involuntary distributions in mind, because the cap on them was clearly specified in paragraph (1) to be $3,500. If Congress had intended to address only involuntary distributions, it would have used the $3,500 figure in place of the $25,000 figure in all three places in paragraph (2) of ERISA § 203(e). The $25,000 references make sense only in the context of determining lump sum distributions not governed by the $3,500 cap, which is to say consensual ones.

Georgia-Pacific has never explained why, if ERISA § 203(e) applies only to non-consensual distributions, subparagraph (2) is replete with references to distribution amounts that can only be made with consent. Instead, Georgia-Pacific places great emphasis on the introductory clause ("For purposes of paragraph (1) . . ."), and it also points out that Congress did not change the heading of § 203(e)—"Restrictions on mandatory distributions"—when it made the 1986 amendments to that subsection of ERISA. We have previously observed that "reliance upon headings to determine the meaning of a statute is not a favored method of statutory construction." *Scarborough v. Office of Personnel Management*, 723 F.2d 801, 811 (11th Cir.1984). While section titles or headings may sometimes be useful to resolve

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[18] Everyone agrees that the reference to "subclause (II)" is a typographical error, and that the reference intended is to subclause or clause (ii).

ambiguity in a statute, the ambiguity here is extreme—the language of § 203(e) actually conflicts with itself.

Moreover, the heading upon which Georgia-Pacific relies originated in the 1984 legislation, before Congress added to ERISA § 203(e) the provisions in 1986 that caused the conflict. It is true that when Congress amended the subsection in 1986, it did not alter the heading of § 203(e).[19] Congressional inaction regarding an existing title is far too thin a reed to support a construction of a statutory provision that would effectively write out of it the very changes that Congress amended the provision to include. *Cf. Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992) ("[C]ourts should disfavor interpretations of statutes that render language superfluous . . . ."); *Bouchard Transp. Co. v. Updegraff*, 147 F.3d 1344, 1351 (11th Cir.1998) ("A basic principle of statutory construction is that a statute should not be construed in such a way as to render certain provisions superfluous or insignificant." (quoting *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966, 970-71 (5th Cir. Apr.1981) (internal quotations and citations omitted))).

The fairest statement that can be made about ERISA § 203(e) on its face is that it is ambiguous about the issue before us. There are indications pointing both ways, although it seems to us that the strongest ones point in the direction of

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[19] However, later that year, the heading of ERISA § 203(e) was changed by the Office of the Law Revision Counsel. *See generally* 2 U.S.C. § 285b(4) (authorizing the Office of the Law Revision Counsel "[t]o classify newly enacted provisions of law to their proper positions in the [United States] Code where the titles involved have not yet been enacted into positive law"). The new heading for ERISA § 203(e), as it appeared in the Code from 1986 to 1994, was: "Consent for distribution; present value; covered distributions." That heading, of course, is less favorable to Georgia-Pacific's position than the one contained in the 1984 version of the legislation.

ERISA § 203(e)'s present value restrictions applying to consensual as well as non-consensual lump sum distributions. Even if we view the ambiguity needle as pointing straight up, the Supreme Court has instructed us:

> [I]f a statute is silent or ambiguous with respect to the question at issue, our longstanding practice is to defer to the executive department's construction of a statutory scheme it is entrusted to administer, unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress.

Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 233, 106 S.Ct. 2860, 2868, 92 L.Ed.2d 166 (1986) (internal quotations and citations omitted).

In the Retirement Protection Act of 1994, Congress removed the language relating to the calculation of present value amounts in excess of $25,000, thereby lessening (or perhaps removing) the ambiguity or self-contradictory nature of the § 203(e) provisions. That amendment may or may not compel a different conclusion as to lump sum distributions made after the effective date of the 1994 legislation. However, Lyons received his distribution in 1993 and the legal issues relating to that distribution, including the validity of Treasury Regulation 1.411(a)-11, are to be decided in view of the statute as it existed at that time.

Georgia-Pacific argues that in the 1994 legislation Congress simply "clarified" its earlier intent. Of course, the Retirement Protection Act of 1994 was enacted by a different Congress than the one that enacted the Tax Reform Act of 1986, which put in place the version of ERISA § 203(e) that we are interpreting. *See Russello v. United States*, 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17 (1983)("[I]t is well settled that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.")

(internal quotations and citations omitted). Whatever effect the 1994 legislation may have on the issues as they relate to distributions after it was enacted, it does not affect our conclusion relating to the issues pertaining to distributions that occurred before then.

Because the language of ERISA § 203(e) itself is ambiguous, at least as it existed at the time Lyons received his distribution, we turn now to the legislative history to see if it "shows with sufficient clarity that the agency construction is contrary to the will of Congress." *Japan Whaling*, 478 U.S. at 233, 106 S.Ct. at 2868. Both parties cite to numerous statements found in the congressional record to support their respective positions. Lyons argues that statements found in the House Conference Report to the Tax Reform Act of 1986 confirm that Congress intended ERISA § 203(e)(2) to apply to all lump sum distributions.[20] That is the legislation that created the textual conflict to begin with.

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[20] The House Conference Report to the Tax Reform Act of 1986 stated:

> If the present value of the vested accrued benefit is no more than $25,000, then the amount to be distributed to the participant or beneficiary is calculated using the PBGC rate.
>
> If the present value of the accrued benefit exceeds $25,000 (using the PBGC interest rate), then the conference agreement provides that the amount to be distributed is determined using an interest rate no greater than 120 percent of the interest rate . . . In no event, however, is the amount to be distributed reduced below $25,000 when the interest rate used is 120 percent of the applicable PBGC rate.
>
> For example, assume that, upon separation from service, the present value of an employee's total accrued benefit . . . is $50,000 using the applicable PBGC rate. Under the conference agreement, the plan may distribute to this employee (if the employee and, if applicable, the employee's spouse consents) the total accrued benefit, calculated using 120 percent of the applicable PBGC rate (e.g., $47,000).

H.R. Conf. Rep. No. 98-841 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4075, 4576. Lyons argues that if the interest rate restrictions applied

Labeling the 1986 legislative history itself "ambiguous," Georgia-Pacific prefers to direct our attention to statements found in the Senate Report to the 1984 legislation which first put ERISA § 203(e) on the books. Georgia-Pacific argues that earlier legislative history shows the discounting-to-present value methodology is limited to involuntary cash-outs of employee benefits.[21] The problem with that argument is that we are concerned with ERISA § 203(e), as amended by the 1986 legislation, not as it existed before. Georgia-Pacific also argues that Congress would have clarified § 203(e) in the Tax Reform Act of 1986 if it had wanted the provision to apply to consensual distributions as well as non-consensual ones. But the same can be said in the other direction: If Congress had wanted § 203(e) to apply only to non-

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solely to the consent determination, the Conference Committee would not have stated that (1) the minimum distribution under the 120% rate is $25,000; and (2) if the amount computed utilizing the 120% rate is, for example, $47,000, the plan must distribute at least $47,000.

[21] The Senate Report to Retirement Equity Act of 1984 states:

> Present Law
>
> Under present law, in the case of an employee whose plan participation terminates, a pension, profit-sharing, or stock bonus plan (pension plan) may involuntarily "cash out" the benefit (i.e., pay out the balance to the credit of a plan participant without the participant's consent) if the present value of the benefit does not exceed $1,750 . . . .
>
> Reasons for Change
>
> The Committee believes that the limit on involuntary cash-outs should be raised to $3,500 in recognition of the effects of inflation on the value of small benefits payable under a pension plan.
>
> Explanation of Provisions.
>
> The bill provides that, if the present value of an accrued benefit exceeds $3,500, then the benefit is not to be considered non-forfeitable if the plan provides that the present value of the benefit can be immediately distributed without the consent of the participant . . . .

S. Rep. No. 98-575 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2569.

consensual distributions, it could have clarified the provision in the Tax Reform Act of 1986 to so provide.

As the previous discussion indicates, the legislative history of § 203(e) provides no answer, much less a clear answer, to the issue at hand. Like the language of the provision, the legislative history is ambiguous. As a result, this is a prototypical situation where regulations are permissible, provided they are otherwise reasonable. We turn now to Georgia-Pacific's arguments that Treasury Regulation 1.411(a)-11 is unreasonable.

Georgia-Pacific contends that the Treasury regulation is unreasonable because, all other factors being equal, it produces benefits that are inversely proportional to the age of the participant at the time the lump sum distribution is taken. To the extent that the argument means the earlier a participant leaves employment the better the payout, that is not entirely true. While interest credits continue after separation from employment, service credits do not. The longer a participant stays employed under the Plan, the more service credits will be added to the accrued annuity, and the larger the effect the interest credit will have (because the interest credit is applied to the Personal Account balance which will grow with the addition of service credits). Moreover, those who design plans can reduce any perceived disparity by reducing or eliminating the difference between the statutory discount rate (which was derived from the PBGC rate at the time of Lyons' distribution) and the interest credit rate. To the extent that Treasury Regulation 1.411(a)-11 does make it easier for younger employees to leave an employer who has a front-loaded, cash balance defined benefit plan, we cannot say that consequence makes the regulation unreasonable in light of the fact that one arguable benefit of such plans is that they allow younger workers to take a larger benefit with them when changing jobs. *See Give Employees Meaningful Information*

When Pensions are Changed to Cash Balance Plans, Says Actuary, PR Newswire, May 7, 1999.[22]

Georgia-Pacific also argues that Treasury Regulation 1.411(a)-11 is unreasonable, because it will not work at all where the credit rate varies in response to some measure of market fluctuations, such as a stock or bond index. As an example, Georgia-Pacific posits a farfetched hypothetical.[23] We note that Georgia-Pacific has not cited any evidence or source indicating that such plans exist, or if they do exist, that they are anything but rare.[24] We will not strike down a

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[22] Georgia-Pacific also contends that the practical effect of Treasury Regulation 1.411(a)-11 will be to cause employers to change plans so that the interest credit rate is no more than the statutorily prescribed maximum discount rate. There is nothing in the record or elsewhere that has been brought to our attention indicating that all or most employers will do so, nor are we prepared to say that if that were the effect it would make the regulation unreasonable in the *Chevron* sense.

[23] Georgia-Pacific points out that the S & P 500 gained approximately 28% in 1998, and posits that "[i]f future interest credits were based on the index, Lyons would be entitled to a 28% annual interest credit on his account balance until age 65 which then would be discounted by the PBGC rate (around 5%)." That would produce, Georgia-Pacific says, "a difference of hundreds of thousands (if not millions) of dollars between the actual account balance" and the one due under Lyons' theory. The hypothetical is farfetched, because it would be foolhardy for a plan to base future annual interest credits on any single year's performance of a market index or indicator. If the plan did, the normal retirement benefit under it could be thrown way out of whack, too, even if there were no early lump sum distributions.

[24] Lyons responds to this argument of Georgia-Pacific by suggesting that such a plan would not satisfy the IRC § 401(a)(25) requirement that pension benefits are to be "definitely determinable" in order for the plan to obtain and maintain qualified status under the Code. We have not had sufficient briefing on whether such a plan would tax qualify for us to be able to decide that issue, nor do we need to do so in order to dispose of the present case. But the existence of the tax qualification issue shows the speculative nature of Georgia-Pacific's hypothetical.

regulation on the basis of a speculative hypothetical. Even if such plans do exist, the Plan before us is not one. We address the reasonableness of the Treasury regulation as it applies to the case before us, involving what we understand to be a not untypical type of front-loaded defined benefit plan with a fixed interest credit rate that permits consensual lump sum distributions before normal retirement age. We have no occasion to decide whether Treasury Regulation 1.411(a)-11 might be unreasonable as applied to a materially different plan, such as one in which the interest credit rate varies with market performance.

Because Congress has not spoken directly to the precise issue, because the legislative history is ambiguous, and because Treasury Regulation 1.411(a)-11 is not unreasonable, at least insofar as it applies to the specific type of plan in this case, Treasury Regulation 1.411(a)-11 is due to be upheld under the *Chevron* decision. *See Atlantic Mut. Ins. Co. v. Comm'r*, 523 U.S. 382, 389, 118 S.Ct. 1413, 1418, 140 L.Ed.2d 542 (1998) ("The task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one." (citation omitted)); *Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. at 2782 n. 11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.") We turn now to Georgia-Pacific's contention that even if the Treasury regulation is valid, it does not apply to this specific Plan.

C. Application to the Plan

Lyons argues that Georgia-Pacific violated Treasury Regulation 1.411(a)-11 by failing to project the amount in his hypothetical account to normal retirement age and then discount that figure back to present value using the maximum

discount rate prescribed in ERISA § 203(e)(2). Three years after Lyons received his lump sum distribution, the IRS issued Notice 96-8, which required ERISA plans to do exactly what Lyons argues Georgia-Pacific was required to do at the time it distributed his lump sum benefit to him. *See* I.R.S. Notice 96-8, 1996-1 C.B. 359, 1996 WL 17901. IRS Notice 96-8 definitively states that the discounting-to-present value methodology found in IRC §§ 411 and 417 applies to cash balance plans. The notice explains that when calculating the lump sum distribution under a cash balance plan, "the balance of the employee's hypothetical account must be projected to normal retirement age and then the employee must be paid at least the present value, determined in accordance with [IRC] section 417(e) [one of the tax counterparts to ERISA § 203(e)], of that projected hypothetical account balance." I.R.S. Notice 96-8 (material in brackets added).[25]

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[25] IRS Notice 96-8 states that it was issued to provide "guidance concerning the requirements of section 411(a) and 417(e) with respect to the determination of the amount of a single sum distribution from a cash balance plan." *Id.* It advises that "in order to comply with 411(a) and 417(e) in calculating the amount of a single sum distribution under a cash balance plan, the balance of the employee's hypothetical account must be projected to normal retirement age and then the employee must be paid at least the present value, determined in accordance with section 417(e), of that projected hypothetical account balance." *Id.*

Notice 96-8 explains that if a plan's interest credit rate exceeds the statutory discount rates set forth in IRC § 417(e), then payment of the participant's hypothetical account balance as the lump sum will result in a smaller benefit than the employee is entitled and thereby violate the anti-forfeiture rules in IRC § 411(a) and the present value requirements of IRC § 417(e). The Notice also predicts that anticipated Treasury regulations will contain a list of interest credit rates described as "standard indices and associated margins." Those rates are "assumed" not to exceed the Internal Revenue Code § 417(e) rate, and plans that utilize the proposed interest credit rates may distribute the hypothetical account balance without violating IRC § 417(e). The Notice concludes with a subsection entitled

Georgia-Pacific cannot be held accountable to Lyons for failing to comply with IRS Notice 96-8 per se, because it was released on January 18, 1996, which was *after* Lyons and those similarly situated to him had received their lump sum benefits. A distribution ought to be judged in light of the law and any official guidance that existed at the time of the distribution. Moreover, according to IRS Notice 96-8 itself, its purpose was not to promulgate binding rules, but to elicit opinions on "anticipated regulations."

Georgia-Pacific contends that until IRS Notice 96-8 was issued, there was no guidance suggesting that Treasury Regulation 1.417 would apply to cash balance plans in the manner advocated by Lyons. It argues that even if this Court gives deference to the Treasury regulation, there was no indication at the time of Lyons' lump sum distribution that Georgia-Pacific should have projected the amount in Lyons' hypothetical account to normal retirement age and then discounted that amount back to present value using ERISA § 203(e)(2) and IRC § 417(e) rates.[26] Georgia-Pacific says

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"Guidance will be prospective," which provides a safe harbor for plans that rely on a "reasonable, good-faith interpretation of the applicable provisions of the [Internal Revenue] Code, taking into account pre-existing guidance." *Id.*

[26] Georgia-Pacific's contention disregards a Treasury decision issued well before Lyons received his distribution. On September 19, 1991, the Secretary of the Treasury issued Treasury Decision 8360 which, among other things, stated that cash balance plans must comply with IRC § 417(e) valuation rules even if the resulting lump sum amount would be greater than the amount in the participant's hypothetical account. That Treasury Decision 8360 stated:

> Several commentators requested clarification of the treatment of cash balance plans, another hybrid plan design . . . . Comments indicated that cash balance plans are becoming increasingly popular.
>
> * * *

that until IRS Notice 96-8 all it was required to distribute as a lump sum was the amount in an individual employee's hypothetical account.[27] We are skeptical about whether lack of guidance and direction can be a defense to this type of action by a plan participant, and in any event Treasury Regulation 1.411(a)-11 when read against the Plan's own terms provides enough guidance that Georgia-Pacific is liable

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> Some of the comments involving cash balance plans . . . requested that the final regulations provide special relief for cash balance plans from the requirements of section 417(e) These rates, when combined into a single blended rate, are sometimes lower than the rates used by existing cash balance plans in determining employees' cash balances, and can therefore require a plan that does not use the section 417(e) rates to determine interest adjustments to pay an employee more than the amount of the employee's hypothetical cash balance when benefits are paid in a single sum. The Treasury and the Service have determined that such relief cannot be granted consistent with the requirements of section 417(e). However, in order to minimize the occasions when this problem will arise, the final regulations include a blended section 417(e) interest rate among the alternative safe harbor interest rates a cash balance plan may use in determining interest adjustments.

T.D. 8360, 56 Fed Reg. 47524, 47528 (1991). Thus, the Treasury Department had put employers on notice of its position that the law required cash balance plans to use the statutory rates in IRC § 417(e), at the time Lyons received his payout, to discount to present value the normal retirement benefit that would have been received if an early lump sum distribution had not been elected.

[27] Along these lines, Georgia-Pacific argues that ERISA § 204(c)(2)(C) permitted it to limit the lump sum distribution to Lyons' Personal Account Balance. But ERISA § 204(c)(2)(C) addresses situations involving "accumulated contributions," which are defined as those that include "mandatory contributions made by the employee." 29 U.S.C. § 1054(c)(2)(C)(i). The Plan in this case did not require or permit employee contributions, so the provision Georgia-Pacific relies upon does not apply.

to plan participants even for distributions made before the issuance of IRS Notice 96-8.[28]

Reiterating some of the features of a cash balance plan is helpful in explaining Georgia-Pacific's obligations under the law as it existed at the time of Lyons' lump sum distribution. As we have explained before, a defined benefit, cash balance plan, such as this one, credits a hypothetical account with service credits and interest credits. Nevertheless, as a defined benefit plan, the plan "consists of a general pool of assets rather than individual dedicated accounts." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439, 119 S.Ct. 755, 761, 142 L.Ed.2d 881 (1999). In a cash balance type of defined benefit plan, "[t]he total assets on deposit do not generally equal the total of all balances maintained for participants." Brown, *supra* note 1, at 83. "[T]he employer typically bears the entire investment risk and—sort of the consequences of plan termination—must cover any underfunding as the result of a shortfall that may occur from the plan's investments." *Hughes Aircraft Co.*, 525 U.S. at 439, 119 S.Ct. at 761 (citing *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 232, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986) (O'Connor, J. concurring)).

Because the plan here is a defined benefit plan, the individual employees "have a right to a certain defined level

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[28] IRS Notice 96-8 contains a "safe harbor" clause that protects from tax disqualification a plan in which pre-Notice distributions were made inconsistently with the provisions of the notice "if the amount of the distribution satisfied those [applicable Internal Revenue Code] sections based on a reasonable, good-faith interpretation of the applicable provisions of the Code, taking into account pre-existing guidance." I.R.S. Notice 96-8. It is by no means clear that Georgia-Pacific could meet the requirements of that "safe harbor." *See* discussion of Treasury Decision 8360 *supra* n. 26. Even if Georgia-Pacific could meet those requirements, it would be safely harbored only from tax disqualification, not from liability to plan participants.

of benefits, known as 'accrued benefits.'" *Id.* at 440, 119 S.Ct. at 761. "That term, for purposes of a defined benefit plan, is defined as 'the individual's accrued benefit determined under the plan [and ordinarily is] expressed in the form of an annual benefit commencing at normal retirement age.' " *Id.* (quoting ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A)).[29] The Plan involved in this case defines "Accrued Benefit" as follows:

> Accrued Benefit means, as of the time of reference, a monthly amount of benefit, payable in the form of an increasing life annuity, commencing on a Participant's Normal Retirement Date, where the amount of such monthly benefit is the result of dividing the then credits to such Participant's Personal Account by the applicable factor from Section A of Appendix A.

Unlike a defined contribution plan, the "accrued benefit" under this Plan is not the amount in the Participant's Personal Account, but rather an amount *derived from* that hypothetical account. Thus, Lyons did not have a statutory right to the amount found in his hypothetical account prior to the normal retirement date, and Georgia-Pacific did not have a right to limit any distribution to him to that amount. Instead, after five years of work, Lyons earned a vested interest in an amount at normal retirement age, to be calculated under the Plan by projecting forward the amount in his hypothetical account using the interest credit rates specified in the Plan.

Treasury Regulation § 1.417(e)-1, which was in effect at the time of the distribution, unequivocally states that "[t]he present value of *any* optional form of benefit cannot be less than the present value of the *normal retirement benefit*

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[29] "By contrast, an 'accrued benefit' for purposes of defined contribution plans means 'the balance of the individual's account.'" *Hughes Aircraft Co.*, 525 U.S. at 440 n. 3, 119 S.Ct. at 761 n. 3 (quoting ERISA § 3(23)(B); 29 U.S.C. § 1002(23)(B)).

determined in accordance with this paragraph." Treas. Reg. § 1.417(e)-1(d) (emphasis added). "Any" means exactly what it says. *See Lyes v. City of Riviera Beach, Florida*, 166 F.3d 1332, 1337 (11th Cir.1999) (en banc) (when no limiting language is used " 'any' means all.") (internal quotations and citations omitted). "[A]ny optional form of benefit" includes a pre-retirement lump sum benefit, which means that such a lump sum distribution cannot be less than "the present value of the normal retirement benefit determined in accordance with" the Treasury regulation.

The "normal retirement benefit" itself, before it is discounted to present value, is determined in accordance with the Plan. It is the amount a participant would have received at age 65 under the Plan but for the election to take an early lump sum distribution. *See* Treas. Reg. § 1.417(e)-1. To determine the normal retirement amount Lyons would have received at age 65, the Plan specifies that his hypothetical account balance must be projected forward using the interest credit rates set forth in the Plan. It is the Plan itself, rather than the Treasury regulations, that requires the hypothetical account balance to be projected forward using the credit interest rate, and it is the Plan itself that specifies the interest credit rate to be applied for that purpose. What the Treasury regulation adds is that once the normal retirement benefit is ascertained in accordance with the Plan, that amount is then to be discounted to present value using the PBGC rate in order to calculate the lump sum distribution to which the participant is entitled.

For these reasons, we conclude that Treasury Regulation 1.411(a)-11, which was issued in 1988, requires that lump sum distributions under the Plan be calculated by determining what would have been the normal retirement benefit had the participant not elected to take an early lump sum distribution, and then discounting that amount to present value using the PBGC rate prescribed in ERISA § 203(e). Distribution of the

hypothetical account balance alone is not enough where, as here, the interest credit rate exceeds the PBGC rate.

D. The IRS Determination Letter

In 1989 the IRS issued Georgia-Pacific a determination letter stating that the Plan was tax qualified. Georgia-Pacific argues that based upon that letter it cannot be held liable for any underpayment of benefits to Lyons and those similarly situated. The reasoning is that in determining the plan was tax qualified the IRS must have concluded that distributing the participant's Personal Account complied with IRC § 417(e), the Internal Revenue Code subsection that parallels ERISA § 203(e).

The one-page determination letter makes no mention at all of the lump sum payment provision, nor is there any indication in the letter that the IRS considered that provision of the Plan, much less the issue now before us. In its amicus brief the IRS urges us not to consider the letter, because it "may have erroneously overlooked the plan provision" for lump sum payments. Because it does not specifically address the issue at hand, the IRS letter is not owed any deference. *See Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465, 469 (7th Cir.1992) ("Given the informal nature of these letters, the express limitations included in the IRS letter, and the absence of any reasoning to explain the basis for the statements, we do not think that any implication in either of these letters . . . is entitled to deference."); *In re Gulf Pension Litigation*, 764 F.Supp. 1149, 1172 (S.D.Tex.1991) ("[T]he Court also finds that the IRS determination is due no deference because it evidences no investigation or legal analysis of the facts by the IRS.").

The letter may protect the Plan from adverse tax treatment, but it does not protect the Plan from liability to participants.[30]

E. Class Representative Problems

The Plan in this case was changed to a cash balance defined benefit plan by an amendment that became effective January 1, 1989. Thereafter, and until the Plan was amended in 1997, it utilized an interest credit rate that was higher than the statutorily prescribed maximum discount rate. The class the district court defined covered all of those who had received lump sum distributions under the Plan that were lower than the present value of their accrued retirement benefit would have been if calculated using the statutorily prescribed discount rate.

Lyons, who is currently the only class representative, received his lump sum distribution in January of 1993. The version of ERISA § 203(e) on the books at that time had remained unchanged in any material way since amendments were made to it by the Tax Reform Act of 1986, and that version continued in effect without material change until amended by the Retirement Protection Act of 1994. Thus, from all that appears Lyons is an adequate representative for all class members who received their lump sum distributions before the 1994 amendment took effect.[31] He suffered the

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[30] The same is true of an IRS determination letter Georgia-Pacific received in 1997, after it made amendments to the Plan that are not relevant to the issue in this case. We mention that second letter only in a footnote, because it was issued long after Lyons and those similarly situated with him had received their distributions.

[31] The 1994 legislation specifies that the relevant amendment "shall apply to plan years and limitation years beginning after December 31, 1994; except that an employer may elect to treat the amendments made by this section as being effective on or after the date of enactment of this Act [December 8, 1994]." Retirement Protection Act of 1994, P.L. 103-

same type of injury as they did, and the law applicable to his claim is the same as that applicable to theirs.

However, Lyons is not an adequate representative for those class members who received their lump sum distributions after the effective date of the 1994 amendment, because their claims are governed by ERISA § 203(e) as amended by that legislation. Lyons has no interest in whether the 1994 amendment altered the legal landscape for those who received distributions thereafter. It does not matter to him, for example, whether the amended language is sufficiently free of ambiguity that the *Chevron* analysis may come out differently. *See supra* Part II. B. Even if it does, that will not affect his claim which is governed by pre-1994 law.

As we have explained before:

> Among the prerequisites to the maintenance of a class action is the requirement of Rule 23(a)(4) that the class representatives "will fairly and adequately protect the interests of the class." The purpose of this requirement, as of many other of Rule 23's procedural mandates, is to protect the legal rights of absent class members. Because all members of the class are bound by the res judicata effect of the judgment, a principal factor in determining the appropriateness of class certification is "the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class."

Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 726 (11th Cir.1987) (citations omitted). We cannot expect Lyons to assert with "forthrightness and vigor" those interests of other class members that he does not share and in which he has no

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465, § 767(d), 108 Stat. 4809, 5039. *See also* ERISA § 205(g)(3)(B), 29 U.S.C. § 1055(g)(3)(B).

stake. Indifference as well as antagonism can undermine the adequacy of representation.[32]

Because there is no adequate class representative before us to advocate the interests of those who received their lump sum distributions after the effective date of the amendment that the Retirement Protection Act of 1994 made to ERISA § 203(e), we have declined to decide whether Treasury Regulation 1.411(a)-11 is a valid regulation insofar as it concerns those distributions. *See supra* 1246. On remand, if an adequate class representative appears to advocate the interests of those who have a stake in that issue, the district court should proceed to decide that issue, and any other issues concerning the threshold liability question that relate particularly to those class members, in the first instance.

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[32] We realize, of course, that class issues, including those relating to the adequacy of representation requirement, are ordinarily raised in the district court whose rulings on such issues are reviewed only for an abuse of discretion. However, the circumstances here are a bit unusual. The district court held that no class member, including Lyons, was entitled to any relief because Treasury Regulation 1.411(a)-11 was unreasonable and invalid even as it applied to those who received their distributions before the effective date of the 1994 amendment to ERISA § 203(e). Lyons appears to have been an adequate representative of all those in the class as to that issue. But now that we have reversed the district court's holding, the issue concerning the adequacy of representation involving distributions made after the 1994 amendment arises. Adequacy of representation issues implicate due process, *see In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1083 (6th Cir.1996), and may be addressed throughout the litigation, *see Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1213-14 (6th Cir.1997)(court of appeals *sua sponte* narrowing class definition and limiting judgment accordingly); *cf.* 7A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1765, at 293 (2d ed. 1986) ("[A] favorable decision under Rule 23(a)(4) is not immutable. If later events demonstrate that the representatives are not adequately protecting the absentees, the court may take whatever steps it thinks necessary under Rule 23(c) or Rule 23(d) at that time.")

III. CONCLUSION

Treasury Regulation 1.411(a)-11 is a reasonable and valid interpretation of ERISA § 203(e), as it existed prior to its amendment by the Retirement Protection Act of 1994, at least as that provision applies to defined benefit cash balance plans with fixed interest credit rates. The district court's judgment, which is based on a holding to the contrary, is due to be reversed.[33]

REVERSED and REMANDED for further proceedings consistent with this opinion.

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[33] As we mentioned earlier in this opinion, the district court at the urging of the parties addressed only the threshold liability issue of potential liability to any class member, and left for the future discovery and decision of other issues that might arise if potential liability were found. *See supra* Part I.C. We leave those issues and any additional defenses Georgia-Pacific may have that are not inconsistent with our holdings in this opinion to be decided on remand.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. GEORGIA
ATLANTA DIVISION

No. Civ.A.1:97CV0980-JOF

JERRY L. LYONS, individually and on behalf of all others similarly situated,

Plaintiff,

v.

GEORGIA-PACIFIC CORPORATION SALARIED EMPLOYEES RETIREMENT PLAN AND GEORGIA-PACIFIC CORPORATION,

Defendants.

March 22, 1999

ORDER

FORRESTER, District Judge.

This matter is before the court on Defendants' motion for summary judgment [22-1] and Plaintiff's cross motion for summary judgment [23-1].

I. STATEMENT OF THE CASE

Plaintiff Jerry L. Lyons filed the instant action on behalf of himself and a class of persons similarly situated against Defendants Georgia-Pacific Corporation and Georgia-Pacific Corporation Salaried Employees Retirement Plan ("SERP" or the "Plan") pursuant to the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, alleging that he was denied his proper benefits under the Plan.

He claims that under § 502(a)(3) of ERISA he is entitled to bring an action to enjoin Defendants' violation of the statute and to obtain equitable relief. The dispute in this case arises over the statutory interpretation of ERISA in conjunction with various provisions of the Internal Revenue Code ("IRC" or "Code") and Treasury Regulations promulgated thereunder. Both Plaintiff and Defendants have filed motions for summary judgment. The parties participated in oral argument before the undersigned on March 11, 1999.

The following facts are undisputed.[1] Plaintiff is a former employee of Defendant Georgia-Pacific Corporation and was a participant in the Defendant SERP. The Plan was a cash balance defined benefit plan, which is a pension plan that defines retirement benefits for employees by reference to a hypothetical account to which hypothetical contributions are periodically made pursuant to various formulas set forth in the Plan. The Plan provided participants with individual account statements of their hypothetical account balances and allowed participants to elect to receive a lump sum distribution of benefits under the Plan in the amount of the balance of their hypothetical accounts.

Plaintiff's employment with Georgia-Pacific terminated on January 5, 1991. At that time, he was 49 years old and had completed over five years of service and was therefore eligible for a "vested" benefit under the Plan. In 1993, Plaintiff elected to receive a total lump sum distribution of his SERP benefits. In accordance with the provisions of the Plan, he received the amount stated as the balance of his individual account: $36,109.35. Although the lump sum distribution made to Plaintiff complied with the terms of the SERP, Plaintiff contends that it was in violation of ERISA.

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[1] The undisputed facts are taken from both parties' motions for summary judgment and construed pursuant to Local Rule 56.1B(2).

Since the commencement of the instant action, the parties have agreed to certification of a class of those employees similarly situated to Plaintiff. Pursuant to a stipulation agreed to by the parties, the court entered an Order certifying a class pursuant to Fed.R.Civ.P. 23(a) of:

> All participants (or beneficiaries of participants) in the [Plan] (i) who received a lump sum distribution of benefits calculated at a time when such participants had a vested interest in the Plan and who (ii) received a distribution of benefits in a lump sum where (iii) at the date as of which the amount of the lump sum was calculated, the lump sum was lower than the present value, if determined using the "applicable interest rate" as defined in Internal Revenue Code Section 417(e)(3) and set forth in Treasury Regulations issued pursuant to Internal Revenue Code Section 417(e), of such participants' accrued benefit, as defined under ERISA.

(Order, September 19, 1997).

The Plan

Taken from the documents submitted by both parties, the court finds the following terms of the SERP relevant. The Plan provided a "Personal Account" to be established for each Participant under the Plan, and for basic monthly credits to be made to the Personal Account for service, depending upon the Participant's compensation. (Plan §§ 3.1, 3.2). Specifically, "[t]he amount of monthly credits to the Personal Account of an eligible Participant [was] equal to four percent (4%) of the Participant's Compensation for that calendar month as determined by the Plan Administrator." (Plan § 3.2). Monthly credits were to be issued to the accounts only up until the Participant's "Severance Date." The Plan went on to provide "Additional Credits" to be issued depending upon the Participant's age at the time of the Plan's effective date (§ 3.3), as well as "Periodic Adjustments" (§ 3.5). Each

Participant's Personal Account was to be automatically increased at the end of each month by Periodic Adjustment Percentage ("PAP"). The PAP was calculated as follows:

> (1) Determine the PBGC [Pension Benefit Guaranty Corporation] 12 month average immediate annuity interest rate for the calendar year preceding the year in which the adjustment is to be made;
>
> (2) Add to (1).75%;
>
> (3) Divide the sum of (1) and (2) by 12; and
>
> (4) Round the result to 6 decimal places.

(Plan § 3.5). Each account was to be increased by an amount equal to the product of the PAP and the Personal Account balance at the beginning of the month up until the Benefit Commencement Date.

The Plan provided five forms of retirement benefits: Normal retirement, early retirement, postponed retirement, disability retirement, and vested benefit. (Plan §§ 4.1-4.5). Normal Retirement was available for a Participant who terminated employment on the Normal Retirement Date. (Plan § 4.1). Normal Retirement Date was defined in the Plan as a Participant's 65th birthday. (Plan § 1.29). A "Vested Benefit" was defined as available for those Participants not eligible for the remaining four retirement benefits who terminated employment after at least five years of service. (Plan § 4.5). The Plan defined the vested benefit for a participant as "equal to his then Accrued Benefit payable in accordance with the provisions of Article 6" of the Plan. (*Id.*). It appears that the normal form of benefit is an increasing annuity.

Further, the Plan provided optional forms of benefits, allowing a Participant to receive, in lieu of the standard benefit, several alternate forms of payment. One of these options was "a single lump sum payment equal to the amount credited to the Participant's Personal Account as of the end of

the month preceding his Benefit Commencement Date." (Plan § 6.4).

The Benefit Commencement Date under the Plan was defined as:

> in the case of an annuity form of distribution, the first day of the first period for which an amount is payable as an annuity under this Plan and, in the case of a lump sum payment, the first date on which all events have occurred which entitle the Participant to payment under this Plan.

(Plan § 1.5).

Applicable Statutes and Treasury Regulations

At the time the distribution at issue in this case was made to Plaintiff, section 203(e) of ERISA provided:

(e) Consent for distribution; present value; covered distributions

(1) If the present value of any nonforfeitable benefit with respect to a participant in a plan exceeds $3,500, the plan shall provide that such benefit may not be immediately distributed without the consent of the participant.

(2)(A) For purposes of paragraph (1), the present value shall be calculated—

(i) by using an interest rate no greater than the applicable interest rate if the vested accrued benefit (using such rate) is not in excess of $25,000, and

(ii) by using an interest rate no greater than 120 percent of the applicable interest rate if the vested accrued benefit exceeds $25,000 (as determined under clause (i)).

In no event shall the present value determined under subclause (II)[sic] be less than $25,000.

(B) For purposes of subparagraph (A), the term "applicable interest rate" means the interest rate which would be used (as of the date of the distribution) by the Pension Benefit Guaranty Corporation for purposes of determining the present value of a lump sum distribution on plan termination.

ERISA § 203(e), 29 U.S.C. § 1053(e).[2] [3]

Section 3002 of ERISA provides for "procedures with respect to continued compliance with Internal Revenue requirements relating to participation, vesting, and funding standards." Specifically, § 3002(c) states:

> Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411 and 412 of Title 26 (related to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter.

ERISA § 3002(c), 29 U.S.C. § 1202(c).

The means for calculating the amount of the lump sum payment urged by the Plaintiff does not expressly appear in ERISA § 203(e). It does appear in Treasury Regulation § 1.411(a)-11, promulgated under IRC § 411, which provides for "restriction and valuation of distributions" and states:

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[2] ERISA § 203(e)(2) 29 U.S.C. § 1053(e)(2) was amended in 1994 to provide an alternate formula for calculation of present value in accordance with 29 U.S.C. § 1055(g)(3), which determines present value by reference to the applicable mortality table and applicable interest rate. All references in this Order to ERISA § 203(e) refer to the pre-1994 version.

[3] At the time Plaintiff received his distribution in the instant case, IRC § 417(e)(3) contained language identical to that of § 203(e)(2) of ERISA in defining the determination of present value.

> Section 411(a)(11) restricts the ability of a plan to distribute any portion of a participant's accrued benefit without the participant's consent. *Section 411(a)(11) also restricts the ability of defined benefit plans to distribute any portion of a participant's accrued benefit in optional forms of benefit without complying with specified valuation rules for determining the amount of the distribution.* If the consent requirements or the valuation rules of this section are not satisfied, the plan fails to satisfy the requirements of section 411(a).

(Emphasis supplied). Treas.Reg. § 1.411(a)-11(a)(1); 26 C.F.R. § 1.411(a)-11(a)(1). Section 1.411(a)-11(d) then went on to discuss these "distribution valuation requirements" and stated, "[i]n determining the present value of any distribution of any accrued benefit from a defined benefit plan, the plan must take into account specified valuation rules. For this purpose, the valuation rules are the same valuation rules for valuing distributions as set forth in section 417(e); *see* § 1.417(e)-1(d)." § 1.411(a)-11(d).

At the time relevant to the instant case, Treasury Regulation 1.417(e)-1(d), promulgated under IRC § 417(e), provided:

> *Present value requirement—(1) Requirements.* For purposes of determining the present value of any accrued benefit and for purposes of determining the amount (subject to sections 411(c)(3) and 415) of any distribution including a single sum, a defined benefit plan is subject to the interest rate limitations described in subparagraph (2) of this paragraph (d) at the time set forth in paragraph (3) of this paragraph (d). A plan amendment that changes the rate described in this paragraph (d) is subject to section 411(d)(6). *The present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit determined in accordance with this paragraph.*

* * *

(Emphasis supplied).[4] Treas.Reg. § 1.417(e)-1(d); 26 C.F.R. § 1.417(e)-1(d).[5]

The Parties' Contentions

Reading the above-referenced statutes and regulations together, Plaintiff contends that Defendants were required, when determining the amount of his benefits, to give effect to Treas.Reg. §§ 1.417(e)-1(d) and 1.411(a)-11, as incorporated into ERISA through § 3002(c). Plaintiff therefore concludes that Defendants should have calculated the present value of his normal retirement benefit under the formula provided in ERISA § 203(e)(2) and paid him no less than that amount. Plaintiff claims that he was entitled to $49,341.83 instead of the $36,109.15 he received under the Plan.

Defendants contend that Plaintiff cannot rely on ERISA § 203(e) in this case, because by its terms it only applies to involuntary distributions and the distribution in this case was voluntarily received by Plaintiff. Defendants base their position on the language of § 203(e), which sets forth the formula for calculating present value and specifically limits the use of the formula to the "purposes of paragraph (1)." ERISA § 203(e)(2). Defendants assert that because

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[4] On January 18, 1996, the IRS released Notice 96-8, 1996-1 C.B. 359, for the purpose of providing "guidance concerning the requirements of section 411(a) and 417(e) with respect to the determination of the amount of a single sum distribution from a cash balance plan." 1996-1 C.B. at 1. After a brief description of cash balance plans as a type of defined benefit pension plan, the Service stated, "in order to comply with 411(a) and 417(e) in calculating the amount of a single sum distribution under a cash balance plan, the balance of the employee's hypothetical account must be projected to normal retirement age and then the employee must be paid at least the present value, determined in accordance with section 417(e), of that projected hypothetical account balance." *Id.* at 2.

[5] Treas.Reg. § 1.417(e)-1 has currently been amended. All references in this Order to the regulation refer to the pre-1994 version.

paragraph (1) of § 203(e) is directed toward a determination of whether consent is required for immediate distribution, the provision and its formula for present value are inapplicable in the instant case.

Plaintiff cites in response to Defendants' argument the Treasury Regulations promulgated under IRC § 411, made applicable to ERISA through § 3002(c), which explain that "[i]n determining the present value of any distribution of any accrued benefit from a defined benefit plan, the plan must take into account specified valuation rules," and also that the provision "applies whether or not the participant's consent is required. . . ." Treas.Reg. § 1.411(a)-11(d). The valuation rules referenced in Treas.Reg. § 1.411(a)-11(d) are those set forth in Treas.Reg. § 1.417(e)-1(d), which state, "[t]he present value of any optional form of benefit cannot be less that the present value of the normal retirement benefit. . . ." Treas.Reg. § 1.417(e)-1(d). Through these regulations, Plaintiff finds authority for his cause of action under ERISA § 203(e).

II. DISCUSSION

Resolution of the dispute between the parties as to the applicability of § 203(e) of ERISA turns on a determination of whether the Treasury Regulations promulgated under the Internal Revenue Code can be relied upon to create a substantive right under ERISA in the instant case. In general, courts do not incorporate Treasury Regulations into ERISA to create substantive rights. *See, e.g., Tulley v. Ethyl Corp.*, 861 F.2d 120, 125 (5th Cir.1988); *Dooley v. American Airlines, Inc.*, 797 F.2d 1447, 1452-53 (7th Cir.1986) (refusing to incorporate regulations promulgated under IRC § 401 into ERISA and citing as authority ERISA § 3002(c), 29 U.S.C. § 1202(c)); *Reklau v. Merchants Nat. Corp.*, 808 F.2d 628, 630-31 (7th Cir.1986) (rejecting contention that regulations promulgated under IRC § 401 can be made applicable to ERISA under ERISA § 3002(c), 29 U.S.C. § 1202(c), and

also finding that IRC § 401 cannot create substantive rights under ERISA); *Cowan v. Keystone Emp. Profit Sharing Fund*, 586 F.2d 888, 890, n. 3 (1st Cir.1978) (finding no substantive right created under IRC § 401).

However, certain regulations promulgated under IRC §§ 410(a), 411 and 412 have been specifically incorporated into ERISA under § 3002(c). Courts have recognized that Treasury Regulations promulgated under these code sections are equally applicable to certain provisions of ERISA. *See, e.g., Williams v. Cordis Corp.*, 30 F.3d 1429, 1431, n. 2 (11th Cir.1994); *Counts v. Kissack Water and Oil Serv., Inc.*, 986 F.2d 1322, 1324, n. 1 (10th Cir.1993); *Abraham v. Exxon Corp.*, 85 F.3d 1126, 1131 (5th Cir.1996). Further, regulations promulgated under ERISA explain the close relationship between specific provisions of ERISA and the Internal Revenue Code. 29 C.F.R. § 2530.200a-1 (stating that the requirements of Part 2 of Title I of ERISA, which contains minimum standards that an employee pension benefit plan must satisfy, are "substantially identical" to the requirements of Subchapter D of Chapter 1 of Subtitle A of the Internal Revenue Code, which sets forth standards for plans seeking qualification for certain tax benefits). Specifically, the regulations under ERISA state:

> Regulations prescribed by the Secretary of the Treasury or his delegate under sections 410 and 411 of the Code (relating to minimum standards for participation and vesting) shall apply for purposes of sections 202 through 204 of [ERISA]. Thus, except for those provisions . . . for which authority to prescribe regulations is specifically delegated to the Secretary of Labor, regulations prescribed by the Secretary of the Treasury shall also be used to implement the related provisions contained in [ERISA].

29 C.F.R. § 2530.200a-2.

Under this authority, the court will construe Treasury Regulation § 1.411 as incorporated into ERISA § 203, as IRC § 411 is the statutory analog to ERISA § 203. However, the substantive right asserted by Plaintiff in the instant case does not appear on the face of the ERISA statute. The appropriate inquiry thus becomes whether the authority to create the substantive right under ERISA at issue in this case was properly delegated by Congress to the Secretary of Treasury and consequently whether the regulation can be given force and effect.

Both IRC § 411 and ERISA § 203 set forth "minimum vesting standards" and specifically require that qualified plans provide that "an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." IRC § 411(a); ERISA § 203(a). Both statutes also go on to require in substantially similar language that if the "present value" of any participant's vested and nonforfeitable benefit exceeds $3,500, the plan must provide that such benefit may not be immediately distributed without the consent of the participant. IRC § 411(a)(11)(A); ERISA § 203(e)(1). The statutes then set forth, *for purposes of* the requirements in IRC § 411(a)(11)(A) and ERISA § 203(e)(1), identical formulas for the computation of present value.[6] IRC § 411(a)(11)(B); ERISA § 203(e)(2).

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[6] The present value is calculated:

> (I) by using an interest rate no greater than the applicable interest rate if the vested accrued benefit (using such rate) is not in excess of $25,000, and
>
> (II) by using an interest rate no greater than 120 percent of the applicable interest rate if the vested accrued benefit exceeds $25,000 (as determined under clause (I)). In no event shall the present value determined under subclause (II) be less than $25,000.

IRC § 411(a)(11)(B); ERISA § 203(e)(2).

The Treasury Regulations promulgated under IRC § 411 specifically address § 411(a)(11). In describing the scope of the statute, the regulations explain that § 411(a)(11) restricts the ability of a plan to distribute an accrued benefit without the consent of the participant, and go on to state that "[s]ection 411(a)(11) also restricts the ability of defined benefit plans to distribute any portion of a participant's accrued benefit in optional forms of benefit without complying with specified valuation rules for determining the amount of the distribution." Treas.Reg. § 1.411(a)-11(a)(1). Section 1.411(a)-11(d) discusses these "distribution valuation requirements," referring to the valuation rules set forth in IRC § 417(e) and Treasury Regulation § 1.417(e)-1(d).

Applying these regulations to ERISA, the court finds that the terms of Treas.Reg. § 1.411(a)-11 would require a plan to comply with the valuation rules set forth in Treas.Reg. § 1.417(e)-1(d) before distributing any portion of a participant's benefit in an optional form. Specifically, the regulations would direct that under ERISA, "[t]he present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit determined in accordance with this paragraph." Treas.Reg. § 1.417(e)-1(d). Accordingly, the application of these regulations would require a plan, in order to comply with ERISA, to make a present value calculation of a participant's normal retirement benefit in accordance with the formula under ERISA § 203(e)(2) and distribute no less than that amount as the present value of an optional benefit.

ERISA § 203(e) on its face applies only in the context of determining whether consent of a participant is required as a prerequisite to making an immediate distribution of benefits. The regulations discussed above necessarily expand the application of § 203(e) to all distributions of benefits, regardless of whether or not consent is required for the distribution. To determine whether application of these

regulations to ERISA can be considered supported by a proper delegation under ERISA to the Secretary of Treasury, the court turns to the guidance of the Supreme Court as set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *Chevron* requires a two-pronged analysis of an agency's interpretation of a statute: (1) "whether Congress has directly spoken to the precise question at issue," and, if not, (2) "whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 842-43, 104 S.Ct. 2778. Where Congress clearly leaves a gap to be filled by an administrative agency, there is an "express delegation" of authority, and regulations enacted thereunder are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S.Ct. 2778. Legislative delegation to an agency can also be implicit rather than explicit, and in that case "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* at 844, 104 S.Ct. 2778. The question for the court in this latter situation is whether the agency's interpretation was a "reasonable" one. *Id.* at 845, 104 S.Ct. 2778.

Congress has generally delegated to the Secretary of Treasury the task of administering the nation's tax laws under 26 U.S.C. § 7805, which provides that "the Secretary shall prescribe all needful rules and regulations for the enforcement" of the Code. Although particular deference is shown by courts in the area of tax law, a regulation deemed unreasonable will not be given force and effect. *United States v. Cartwright*, 411 U.S. 546, 550, 93 S.Ct. 1713, 36 L.Ed.2d 528 (1973), *R.J.R. Nabisco, Inc. v. United States*, 955 F.2d 1457, 1464 (11th Cir.1992); *Chevron*, 467 U.S. at 845, 104 S.Ct. 2778.

As discussed below, the court cannot find that the Secretary of Treasury's interpretation of ERISA § 203(e) through Treasury Regulation § 1.411(a)-11 was a reasonable one that can be given force and effect in the instant case. ERISA § 203 is directed toward the establishment of "minimum vesting standards," and subsection (e) specifically legislates requirements for "consent for distribution; present value; covered distributions." ERISA § 203(e) plainly sets forth requirements for situations in which employers must obtain the consent of participants before making immediate distributions of benefits and provides a formula *for the purpose of* calculating present value in making this determination. ERISA § 203(e). Nowhere on the face of § 203(e) is there any reference to general lump sum distributions under the plan. In addition, the court can find no suggestion in the legislative history or otherwise to suggest that ERISA § 203(e) was intended to serve as a blanket requirement that any distribution under an ERISA plan comply with the formula for present value set forth in § 203(e)(2). Further, even looking beyond ERISA, the court finds no authority in the legislative history of IRC § 411 or otherwise to support the portion of Treas.Reg. § 1.411(a)-11 as applied under the Code. Instead, commentary relating to both ERISA § 203 and IRC § 411 which was considered by the court seems to refer only to the present value computation in the context of determining whether benefit distributions can be involuntarily made. *See, e.g.*, S.Rep. No. 103-412 (1994); H.R.Rep. No. 103-826(I) (1994); H.R.Rep. No. 103-632(I) (1994).

It is evident that Treasury Regulation § 1.411(a)-11 clearly purports to restrict the ability of defined benefit plans to distribute a portion of a participant's accrued benefit without complying with specified valuation rules as set forth in

Treasury Regulation § 1.417(e)-1(d).[7] However, the court can find no congressional authorization for the expansion of ERISA § 203(e) effected by Treas.Reg. § 1.411(a)-11. Plaintiff has not directed the court to any authority under which Treas.Reg. § 1.411(a)-11(a) expanded the scope of ERISA § 203(e) or IRC § 411 or any policy reasons why such an expansion should be given effect.

What is produced in the world by the regulations is this: An employer such as the Defendant, chooses to compound the employee's hypothetical balance monthly at a rate in excess of any rate required by law. At early termination the employee has the options, among others, of receiving either the normal annuity at age 65 or the full amount of his hypothetical account. If, as here, his account is large enough, the election is voluntary and the participant is free to make the decision that he thinks is in his economic best interest. He may decide that an annuity at the normal retirement age under the plan may have greater value, or he may believe that he can best the compounding rate used by his employer and take the lump sum. In no way can it be said that the plan unfairly divests him of his due. It is difficult to see how the regulations implement any objective of ERISA.

It may be contended that he is forfeiting some of his normal benefit. There are two answers to that. The first is that he is free to take either. The second is that it is only made to appear that there is a difference in value by a computational contrivance that has only slight connection to economic reality. The parties say that under the regulations the balance in the hypothetical account is run out to age 65 using the more generous rate selected by the employer, and then is discounted back to present value at the Pension Benefit Guaranty Corporation rate, which was said at argument to be about 4.5%. Even today, when interest rates

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[7] The court notes that I.R.S. Notice 96-8, 1996-1 C.B. 359, evidences such an intent on the part of the Treasury Department.

are remarkably low and the yield curve on government bonds is almost flat, this discount rate is about one point lower than would be available to the participant in some of the most conservative of investments. These regulations, then, do not so much preserve benefit value as they create an economic windfall not intended by ERISA.

Accordingly, the court finds the portion of Treas.Reg. § 1.411(a)-11 at issue in this case an unreasonable construction of the congressional mandate set forth in ERISA § 203(e). The interpretation of the Secretary is clearly beyond the scope of the language of the statute, and the court has found no evidence outside the statute to explain the expansion. Instead, the court finds a substantive right, unsupported by the text of ERISA, created by the Secretary of Treasury without authorization from a congressional mandate. Therefore, under *Chevron*, the court cannot find that the interpretation reflected in Treas.Reg. § 1.411(a)-11 meets the minimum threshold of reasonableness needed to give it force and effect.

Because the portion of Treas.Reg. § 1.411-11(a) relied upon by Plaintiff has been deemed by the court to be an unreasonable regulation incorporated under ERISA § 203(e), Plaintiff cannot rely upon the Treasury Regulations as the source of his substantive right in the instant case. Without the application of Treasury Regulations §§ 1.411(a)-11(d) and 417(e)-1(d), Plaintiff has no evident cause of action under ERISA § 203(e). Accordingly, Plaintiff's motion for summary judgment must be denied and Defendants' motion for summary judgment granted.

III. CONCLUSION

Defendants' motion for summary judgment [22-1] is GRANTED and Plaintiff's cross motion for summary judgment [23-1] is DENIED.

SO ORDERED.

APPENDIX C

[Filed Oct. 25, 2000]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10640-GG

JERRY L. LYONS, individually and on behalf of all others persons similarly situated,
Plaintiff-Appellant,

versus

GEORGIA PACIFIC CORPORATION SALARIED EMPLOYEES RETIREMENT PLAN, GEORGIA PACIFIC CORPORATION,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: CARNES, BARKETT and WILSON, Circuit Judges.

PER CURIAM:

The petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX D

FEDERAL STATUTE AND REGULATIONS

26 U.S.C. §1053 (1993) Minimum vesting standards

* * * *

(e) Consent for distribution; present value; covered distributions

(1) If the present value of any nonforfeitable benefit with respect to a participant in a plan exceeds $3,500, the plan shall provide that such benefit may not be immediately distributed without the consent of the participant.

"(2)(A) For purposes of paragraph (1), the present value shall be calculated— ,

> "(i) by using an interest rate no greater than the applicable interest rate if the vested accrued benefit (using such rate) is not in excess of $25,000, and
>
> "(ii) by using an interest rate no greater than 120 percent of the applicable interest rate if the vested accrued benefit exceeds $25,000 (as determined under clause (i)).

In no event shall the present value determined under subclause (II) be less than $25,000.

"(B) For purposes of subparagraph (A), the term 'applicable interest rate' means the interest rate which would be used (as of the date of the distribution) by the Pension Benefit Guaranty Corporation for purposes of determining the present value of a lump sum distribution on plan termination."

(3) This subsection shall not apply to any distribution of dividends to which section 404(k) of title 26 applies.

(Pub. L. 93-406, title I, § 203, Sept. 2, 1974, 88 Stat. 854; Pub. L. 96-364, title III, § 303, Sept. 26, 1980, 94 Stat. 1292; Pub. L. 98-397, title I, §§ 102(b), (c), (d)(2), (e)(2), 105(a),

Aug. 23, 1984, 98 Stat. 1426-1428, 1436; Pub. L. 99-514, title XI, §§ 1113(e)(1), (2), (4)(A), 1139(c)(1), title XVIII, § 1898(a)(1)(B), (4)(B)(i), (d)(1)(B), (2)(B), Oct. 22, 1986, 100 Stat. 2447, 2448, 2487, 2942, 2944, 2955; Pub. L. 101-239, title VII, §§ 7861(a)(I), (5)(B), (6)(B), 7862(d)(4), (5), (10), 7891(a)(1), (b)(1), (2), 7894(c)(3), Dec. 19, 1989, 103 Stat. 2430, 2434, 2445, 2449.)

Treasury Regulation § 1.411(a)—11 (1988) Restriction and valuation of distributions.

(a) Scope—(1) In general. Section 411(a)(11) restricts the ability of a plan to distribute any portion of a participant's accrued benefit without the participant's consent. Section 411(a)(11) also restricts the ability of defined benefit plans to distribute any portion of a participant's accrued benefit in optional forms of benefit without complying with specified valuation rules for determining the amount of the distribution. If the consent requirements or the valuation rules of this section are not satisfied, the plan fails to satisfy the requirements of section 411(a).

* * * *

[T.D. 8219, 53 FR 31853, Aug. 22, 1988; 53 FR 48534, Dec. 1, 1988]

Treasury Regulation § 1.417(e)-1 (1993) Restrictions and valuations of distributions from plans subject to sections 401(a)(11) and 417.

* * * *

(d) Present value requirement—(1) Requirements. For purposes of determining the present value of any accrued benefit and for purposes of determining the amount (subject to sections 411(c)(3) and 415) of any distribution including a single sum, a defined benefit plan is subject to the interest rate limitations described in subparagraph (2) of this paragraph (d) at the time set forth in subparagraph (3) of this paragraph (d). A plan amendment that changes the rate

described in this paragraph (d) is subject to section 411(d)(6). The present value of any optional form of benefit can not be less than the present value of the normal retirement benefit determined in accordance with this paragraph.

(2) Section 417 interest rate. The section 417 interest rate is (i) the rate or rates that would used by the Pension Benefit Guaranty Corporation" (PBGC) for a trusteed single-employer plan to value the participant's (or beneficiary's) vested benefit ("applicable interest rate") if the present value of such benefit does not exceed $25,000 (ii) and 120 percent of the applicable interest rate, determined in accordance with (i) above, if such present value exceeds $25,000. In no event shall the present value determined by use of 120 percent of the applicable interest rate result in a present of the less than $25,000. The applicable interest rate may be a series of interest rates for any given date. For example, the applicable rate could be X percent for the first 5 years over which the benefits are valued, Y percent for the next succeeding 10 years and Z percent for the following years. In such case, 1.20 percent of the applicable interest rate would be 1.20 times X percent, 1.20 times Y percent and 1.20 times Z percent over the years described above. The applicable interest rates are the interest rates that would be used (as of the date of the distribution) by the PBGC for purposes of the present value of that benefit upon termination of an insufficient trusteed single-employer plan. Except as otherwise provided by the Commissioner, the applicable interest rates are determined by PBGC regulations. See 29 CFR part 2619 for the applicable PBGC rates.

(3) Time for determining interest rate. (i) Except as provided in subdivision (ii), the section 417 interest rate limitations are determined on either the annuity starting date or the first day of the plan year that contains the annuity starting date. The plan must provide which date is applicable.

(ii) The plan may provide for the use of any other time for determining the interest rate provided that such time is not

more than 120 days before the annuity starting date if such time is determined in a consistent manner and is applied uniformly to all participants.

(iii) The Commissioner may in revenue rulings, notices or other documents of general applicability prescribe other times for determining the section 417 interest rate limitations.

(iv) If a plan amendment changes the time for determining the section 417 interest rate, the amendment will not be treated as reducing an accrued benefit if the conditions of this subdivision (iv) are satisfied. Any distribution in the one-year period commencing at the time the plan amendment is effective (if the amendment is effective on or after the adoption date) must use the rate determined under the plan, either before or after the amendment, that results in the larger accrued benefit. If the plan amendment is adopted retroactively (that is, the amendment is effective prior to the adoption date), the plan must use the rate resulting in the larger accrued benefit for the period beginning with the effective date and ending one year after the adoption date.

(4) Determination of interest rates. (i) In the case of a defined benefit plan that uses a rate or rates in addition to the section 417 interest rate, the rate producing the greatest benefit must be used.

(ii) The same interest rate that is required to be used by the plan under this paragraph (d) to determine the amount of benefit must also be used to compute the present value of the benefit for purposes of determining whether consent for a distribution is required under paragraph (b) of this section.

(iii) Example. A qualified defined benefit plan provides that single sum distributions received on or before normal retirement age are to be determined using the lower of the rate(s) of interest guaranteed under a particular annuity contract of an unrelated insurance company or the applicable section 417 rates. The rates of interest guaranteed under the

annuity contract are 10% for the first 5 years, 7.5% for the next 10 and 5% thereafter while the applicable section 417 interest rates would be 8% and 120% of such rate would be 9.6%. Because in some years over which a benefit is valued the interest rate under the PBGC rates would be the lower rate while in other years it would be the higher rate, the rate that must be used is the one that results in the greater plan benefit.

(5) Exceptions. This paragraph (d) (other than the reference to section 411(d)(6) requirements) does not apply to the amount of a distribution under a nondecreasing annuity payable for a period not less than the life of the participant or, in the case of a QPSA, the life of the surviving spouse. A nondecreasing annuity includes a QJSA, QPSA and an annuity that decreases merely because of the cessation or reduction of Social Security supplements or qualified disability payments (as defined in section 411(a)(9)).

(6) Defined contribution plans. Because the accrued benefit. in a defined contribution plan equals the account balance, such plans are not subject to the interest rate requirements of this paragraph (d), even though they are subject to section 401(a)(11).

* * * *

[T.D. 8219, 53 FR 31854, Aug. 22, 1988; T.D. 8219, 53 FR 48534, Dec. 1, 1988]

APPENDIX E

I.R.S. NOTICE

CASH BALANCE PENSION PLANS

Notice 96-8

I. Purpose

This notice describes and requests comments on proposed guidance concerning the application of sections 411 and 417(e) to single sum distributions under defined benefit pension plans that are cash balance plans. The proposed guidance is being described in this notice in order to permit advance public comment in anticipation of the publication of regulations that incorporate the proposed guidance.

II. Background

A. General description of cash balance plans

In general terms, a cash balance plan is a defined benefit pension plan that defines benefits for each employee by reference to the amount of the employee's hypothetical account balance. An employee's hypothetical account balance is credited with hypothetical allocations and hypothetical earnings determined under a formula selected by the employer and set forth in the plan. These hypothetical allocations and hypothetical earnings are designed to mimic the allocations of actual contributions and actual earnings to an employee's account that would occur under a defined contribution plan. Cash balance plans often specify that hypothetical earnings (referred to in this notice as interest credits) are determined using an interest rate or rate of return under a variable outside index (*e.g.*, the annual yield on one-year Treasury securities). Most cash balance plans also are designed to permit, after termination of employment, a distribution of an employee's entire accrued benefit in the form of a single sum distribution equal to the employee's

hypothetical account balance as of the date of the distribution. Many cash balance plans also provide that if distribution is in the form of an annuity, the amount of the annuity is determined by dividing the hypothetical account balance by an annuity conversion factor.

As explained below, in order to comply with sections 411(a) and 417(e) in calculating the amount of a single sum distribution under a cash balance plan, the balance of the employee's hypothetical account must be projected to normal retirement age and then the employee must be paid at least the present value, determined in accordance with section 417(e), of that projected hypothetical account balance. If a cash balance plan provides interest credits using an interest rate that is higher than the section 417(e) applicable interest rate, payment of a single sum distribution equal to the hypothetical account balance as a complete distribution of the employee's accrued benefit may result either in a violation of section 417(e) or a forfeiture in violation of section 411(a). This is because, in such a case, the present value of the employee's accrued benefit, determined using the section 417(e) applicable interest rate, will generally exceed the hypothetical account balance. The following example illustrates this potential problem.

Example. A cash balance plan provides for interest credits at a fixed rate of 8% per annum that are not conditioned on continued employment, and for annuity conversions using the section 417(e) applicable interest rate and mortality table. A fully vested employee with a hypothetical account balance of $45,000 terminates employment at age 45 and elects an immediate single sum distribution. At the time of the employee's termination, the section 417(e) applicable interest rate is 6.5%.

The projected balance of the employee's hypothetical account as of normal retirement age is $209,743. If $209,743

is discounted to age 45 at 6.5% (the section 417(e) applicable interest rate), the present value equals $59,524.

Accordingly, if the plan paid the hypothetical account balance of $45,000, instead of $59,524, the employee would receive $14,524 less than the amount to which the employee is entitled.

Even if a cash balance plan provides interest credits using an interest rate that exceeds the section 417(e) applicable interest rate, the plan can satisfy sections 417(e) and 411(a). Such a plan would provide that the amount of any single sum distribution is equal to the present value of the employee's accrued benefit determined in a manner that satisfies sections 411(a) and 417(e) even if the amount of the single sum exceeds the employee's hypothetical account balance. Thus, in the example above, the plan would satisfy sections 411(a) and 417(e) if the employee received a single sum distribution of $59,524 (the present value of the employee's accrued benefit) rather than $45,000 (the employee's hypothetical account balance).

B. Existing regulatory safe harbor for cash balance plans

Section 1.401(a)(4)-8(c) of the Income Tax Regulations, as issued in September 1991, provides a safe harbor testing method for cash balance plans. Under this method, a cash balance plan could be tested for nondiscrimination as though it were a defined contribution plan with actual allocations equal to the amount of the hypothetical allocations credited for the plan year. In order to use the safe harbor, a cash balance plan must satisfy certain design requirements that relate to the accrued benefit and valuation rules that are unique to defined benefit plans.

Comments on the September 1991 regulations expressed concern that the safe harbor plan design requirements reflected an interpretation by the Service and Treasury of the qualification requirements that, in certain cases, would

require cash balance plans to pay a single sum distribution in excess of the hypothetical account balance. Guidance was requested on the circumstances in which a cash balance plan (whether or not it qualifies for safe harbor nondiscrimination testing) is permitted to distribute a single sum distribution equal to the hypothetical account balance without violating section 411(a) or 417(e).

When revised regulations under section 401(a)(4) were issued in September 1993, the safe harbor testing method for cash balance plans was left unchanged. The Preamble to those regulations indicated that the safe harbor testing method for cash balance plans had generated significant comment and that further guidance would be issued at a later date.

III. Analysis

A. Nonforfeiture and accrual rules

A cash balance plan is a defined benefit plan, not a defined contribution plan, because the benefits provided are not based solely on actual contributions and forfeitures allocated to an employee's account and the actual investment experience and expenses of the plan allocated to the account. Section 411(a)(7) defines an employee's accrued benefit differently for defined benefit plans than for defined contribution plans. Also, defined benefit plans are subject to a number of statutory provisions that do not apply to defined contribution plans. These include the rules of section 411(b)(1) that limit "backloading" of accruals; the valuation rules of section 417(e); and the definitely determinable benefits requirement of section 401(a)(25). These provisions limit the extent to which a cash balance plan can mimic the benefit and accrual structure of a defined contribution plan.

Under section 411(a)(2), an employee's accrued benefit must become nonforfeitable in accordance with one of the schedules specified in that section. Under § 1.411(a)-7 (a)(1)(ii), the term "accrued benefits" generally refers only to

pension or retirement benefits. Under section 411(b)(1), the accrual of the retirement benefits payable at normal retirement age must satisfy one of the rules in section 411(b)(1)(A), (B) or (C).

Under a cash balance plan, the retirement benefits payable at normal retirement age are determined by reference to the hypothetical account balance as of normal retirement age, including benefits attributable to interest credits to that age. Thus, benefits attributable to interest credits must be taken into account in determining whether the accrual of the retirement benefits under a cash balance plan satisfies one of the rules in section 411(b)(1)(A), (B) or (C). Moreover, benefits attributable to interest credits are in the nature of accrued benefits within the meaning of § 1.411(a)-7(a), rather than ancillary benefits, and thus, once accrued, must become nonforfeitable in accordance with a vesting schedule that satisfies section 411(a).

Cash balance plans can be categorized based on when the benefits attributable to interest credits accrue. Under one type of cash balance plan (referred to in this notice as a frontloaded interest credit plan), future interest credits to an employee's hypothetical account balance are not conditioned upon future service. (Of course, benefits attributable to future interest credits may be forfeited in accordance with the plan's vesting provisions, to the extent permitted under section 411.) Thus, in the case of a frontloaded interest credit plan, the benefits attributable to future interest credits with respect to a hypothetical allocation accrue at the same time that the benefits attributable to the hypothetical allocation accrue. As a result, if an employee terminates employment and defers distribution to a later date, interest credits will continue to be credited to that employee's hypothetical account.

A second type of cash balance plan (referred to in this notice as a backloaded interest credit plan) conditions future interest credits upon further service. In the case of a

backloaded interest credit plan, benefits attributable to interest credits do not accrue until the interest credits are credited to the employee's account. Because backloaded interest credit plans typically will not satisfy any of the accrual rules in section 411(b)(1)(A), (B) or (C), it is anticipated that the proposed guidance will address only frontloaded interest credit plans.

B. Single sum distributions from frontloaded interest credit plans

As indicated above, most cash balance plans are designed to permit a distribution of an employee's entire accrued benefit, after termination of employment, in the form of a single sum equal to the employee's hypothetical account balance as of the date of the distribution. In order for a defined benefit plan to satisfy section 417(e), any single sum distribution payable to an employee from the plan must not be less than the nonforfeitable portion of the present value of the employee's accrued benefit under section 411(a)(7) (determined using the applicable interest rate and mortality table under section 417(e)).

1. Determination of the accrued benefit

In the case of a frontloaded interest credit plan, an employee's accrued benefit as of any date before attainment of normal retirement age is based on the employee's hypothetical account balance as of normal retirement age, including future interest credits to that age. If such a plan specifies a fixed interest rate for use in determining future interest credits, the employee's hypothetical account balance as of normal retirement age (including future interest credits) can be calculated precisely before normal retirement age. However, if a frontloaded interest credit plan specifies a variable outside index for use in determining the amount of interest credits, the precise dollar amount of an employee's hypothetical account balance as of normal retirement age

(including future interest credits to normal retirement age), and thus the precise dollar amount of the employee's accrued benefit as of any date before normal retirement age, cannot be calculated prior to normal retirement age.

A frontloaded interest credit plan that specifies a variable outside index for use in determining the amount of interest credits must prescribe the method for reflecting future interest credits in the calculation of an employee's accrued benefit. In order to comply with section 401(a)(25), the method, including actuarial assumptions, if applicable, must preclude employer discretion. Further, in determining the amount of an employee's accrued benefit, a forfeiture, within the meaning of § 1.411(a)-4T, will result if the value of future interest credits is projected using a rate that understates the value of those credits or if the plan by its terms reduces the interest rate or rate of return used for projecting future interest credits. A forfeiture in violation of section 411(a) also will occur if, in determining the amount of an employee's accrued benefit, future interest credits are not taken into account (*i.e.*, there is no projection of future interest credits) and this has the same effect as using a rate that understates the value of future interest credits.

2. Calculation of the present value of the employee's accrued benefit

In the case of a frontloaded interest credit plan, a single sum distribution optional form of benefit equal to the hypothetical account balance will satisfy section 417(e) only if the single sum distribution is not less than the present value of the employee's accrued benefit calculated in accordance with the applicable interest rate and mortality table under section 417(e)(3). As noted above, the amount of the employee's accrued benefit must be determined using a method of reflecting future interest credits that satisfies section 401(a)(25) and that does not create a forfeiture in violation of section 411(a).

3. Situations in which the present value will not exceed the hypothetical account balance

A frontloaded interest credit plan might provide that the amount of interest credits is determined using a variable interest rate or rate of return that, by its terms, is no greater than the applicable interest rate under section 417(e)(3). For example, a plan that has been amended to comply with the changes to section 417(e) made by the Retirement Protection Act of 1994 (RPA '94) might provide that interest credits are determined using the lesser of the current rate of interest on 30-year Treasury securities or the current yield on 1-year Treasury Constant Maturities. Under such a plan, future interest credits can, without violating section 411(a), be projected to normal retirement age using a rate that is no greater than the applicable interest rate under section 417(e)(3). In that case, assuming that the annuity conversion factor under the plan is not less than the annuity conversion factor determined using the applicable interest rate and mortality table under section 417(e)(3), the employee's hypothetical account balance will equal or exceed the present value of the employee's accrued benefit determined in accordance with section 417(e). Thus, a single sum distribution equal to the employee's hypothetical account balance under such a plan will satisfy sections 411(a) and 417(e).

In other cases, a single sum distribution equal to an employee's hypothetical account balance will satisfy sections 417(e) and 411(a) if (a) the annuity conversion factor is not less than the annuity conversion factor determined using the applicable interest rate and mortality table under section 417(e)(3), (b) under the method for reflecting future interest credits in the calculation of an employee's accrued benefit, the future interest credits are projected using a rate that is no greater that the applicable interest rate under section 17(e)(3),

and (c) this projection does not result in a forfeiture in violation of section 411(a).

By contrast, if the interest rate or rate of return under the plan used in determining the amount of interest credits is high relative to the section 417(e)(3) interest rate, the plan cannot distribute a single sum equal to the employee's hypothetical account balance and satisfy sections 411(a) and 417(e). If such a plan provided that, in determining an employee's accrued benefit, the rate used for projecting the amount of future interest credits was no greater than the interest rate under section 417(e)(3), the projection would result in a forfeiture. Alternatively, if the plan provided for interest credits to be projected using a rate that exceeded the section 417(e) interest rate but then provided for the benefit to be discounted using that same higher rate, the plan would violate section 417(e).

C. Effect of defining the accrued benefit as the hypothetical account balance

The requirements referred to in this notice apply even in the case of a cash balance plan that defines an employee's accrued benefit as ~~an~~ amount equal to the employee's hypothetical account balance. Section 411(a)(7) defines the accrued benefit in terms of benefits payable under the plan at normal retirement age. In a cash balance plan, for an employee who has not attained normal retirement age, whether the employee's retirement benefit payable at normal retirement age under the plan includes benefits attributable to future interest credits depends on whether those benefits have accrued.

If benefits attributable to future interest credits have accrued, and those benefits are disregarded when benefits commence before normal retirement age, the plan has effectively conditioned entitlement to the benefits attributable to those future interest credits on the employee not taking a

distribution prior to normal retirement age. Pursuant to § 1.411(a)-4T, a right that is conditioned under the plan on a subsequent forbearance is a forfeitable right. Accordingly, conditioning entitlement to benefits on the employee not taking a distribution violates the nonforfeitability requirements of section 411(a).

Alternatively, if the benefits attributable to future interest credits have not accrued and will accrue only as of the later dates when the interest credits are included in the hypothetical account balance, the timing of those later accruals must be taken into account in applying the accrual rules of section 411(b)(1). As a result, such a plan typically will not satisfy those accrual rules.

IV. Description of proposal

A. Variable interest rates that may be assumed for these purposes to be no greater than the 30-year Treasury interest rate

It is anticipated that the regulations will set forth a list of standard indices and associated margins for use with frontloaded interest credit plans that provide interest credits equal to the product of the balance of the hypothetical account and the current value of a variable index. (It is anticipated that this proposal will apply without regard to how frequently the rate used to determine interest credits is compounded.) Under a frontloaded interest credit plan that, for this purpose, specifies a variable index equal to the PBGC immediate rate or the sum of one of the standard indices and a margin not greater than the specified margin associated with that standard index, no impermissible forfeiture would result from projecting that the rate used to determine future interest credits for an employee is no greater than the applicable interest rate under section 417(e)(3), as amended by RPA '94. Thus, if such a plan has been amended to comply with the changes to section 417(e) made by RPA '94, the employee's

entire accrued benefit could be distributed in the form of a single sum distribution equal to the employee's hypothetical account balance without violating section 411(a) or 417(e), provided that the plan provides the appropriate annuity conversion factors.

The table below provides the proposed list of standard indices and associated margins. The discount rates on Treasury bills and the yields on Treasury Constant Maturities are the rates reported in the Federal Reserve Bulletin, and the Consumer Price Index is CPI-U, as reported by the Department of Labor. Authority would be delegated to the Commissioner to approve other indices and associated margins.

Standard Index	Associated Margin
The discount rate on 3-month Treasury Bills	175 basis points
The discount rate on 6-month Treasury Bills or 12-month Treasury Bills	150 basis points
The yield on 1-year Treasury Constant Maturities	100 basis points
The yield on 2-year Treasury Constant Maturities or 3-year Treasury Constant Maturities	50 basis points
The yield on 5-year Treasury Constant Maturities or 7-year Treasury Constant Maturities	25 basis points
The yield on 10-year Treasury Constant Maturities or any longer period Treasury Constant Maturities	0 basis points
Annual rate of change of the Consumer Price Index	3 percentage points

In developing these standard indices and associated margins, the Service and Treasury took into account the historical relationship between each of these indices and the rate of interest on 30-year Treasury securities.

Under the proposal, if a frontloaded interest credit plan specified a variable index for use in determining the amount of interest credits that is equal to the sum of a standard index (listed in the table above) and a margin that exceeds the specified margin associated with that standard index, distribution of a single sum equal to the employee's hypothetical account balance would not satisfy both section 411(a) and section 417(e). If such a plan provided that the rate used for projecting the amount of future interest credits was no greater than the interest rate under section 417(e)(3), the projection would result in a forfeiture. Alternatively, if a frontloaded interest credit plan provided for interest credits to be projected using a rate that exceeded the section 417(e) interest rate but then provided for the benefit to be discounted using that same higher rate, the plan would violate section 417(e).

B. Guidance will be prospective

The anticipated regulations will be effective prospectively. In addition, for plan years beginning before the regulations are effective, a frontloaded interest credit plan would not be disqualified for failing to satisfy section 411(a) or 417(e) if the amount of the distribution satisfied those sections based on a reasonable, good-faith interpretation of the applicable provisions of the Code, taking into account pre-existing guidance. For this purpose, plans that comply with the guidance in this notice are deemed to be applying a reasonable, good faith interpretation.

V. Comments

The Service and Treasury invite comments on the proposal described in this notice. Comments are specifically requested on other indices for which guidance may be appropriate and on guidance that would facilitate the transition to use of an approved index (including possible guidance with respect to the application of section 411(d)(6)). Any suggestion of an index (and associated margin, if any) should include an analysis of the historical relationship between the index and the rate for 30-year Treasury securities. Comments should be submitted in writing, referencing Notice 96-7, and addressed to—

Associate Chief Counsel
(Employee Benefits and Exempt Organizations)
CC: EBEO
ATTN: Cash Balance Guidance
Room 5214
Internal Revenue Service
1111 Constitution Ave., N.W.
Washington, D.C. 20224

APPENDIX F

GEORGIA-PACIFIC CORPORATION SALARIED EMPLOYEES RETIREMENT PLAN

AS AMENDED AND RESTATED EFFECTIVE JANUARY 1, 1989

[Sections 1.1, 6.2, 6.3(a), 6.4(a), 8.2]

* * * *

ARTICLE 1

DEFINITIONS

The following words and phrases as used herein shall have the following meanings, unless a different meaning is plainly required by context:

1.1 *Accrued Benefit.* Accrued Benefit means, as of the time of reference, a monthly amount of benefit, payable in the form of an increasing life annuity, commencing on a Participant's Normal retirement Date, where the amount of such monthly benefit is the result of dividing the then credits to such Participant's Personal Account by the applicable factor from Section A of Appendix A.

* * * *

ARTICLE 6

PAYMENT OF BENEFITS

* * * *

6.2 *Standard Benefit.* The normal form of benefit payable to a Participant who is not married at his Benefit Commencement Date is an increasing annuity for the life of the Participant . . . .

* * * *

6.3 *Standard Benefit for Married participants.*

(a) The normal form of benefit payable to a Participant who is married at his Benefit Commencement Date is a joint and fifty percent (50%) surviving spouse increasing annuity . . . .

* * * *

6.4 *Optional Forms of Benefit.*

(a) An unmarried Participant, or a married Participant who has made an election under Section 6.3(e), May elect to receive, in lieu of the standard form of benefit in Sections 6.2 of 6.3, a benefit in one of the optional forms described below:

* * * *

Option C: Lump Sum Payment. A single Lump sum payment equal to the amount credited to the Participant's Personal Account as of the end of the month preceding his Benefit Commencement Date.

* * * *

ARTICLE 8

ADMINISTRATION OF THE PLAN

* * * *

8.2 *Powers and Duties.* The Plan Administrator shall have complete discretionary control of the administration of this Plan, with all powers necessary to enable it properly to carry out its duties in that respect, including the power to construe this plan and to resolve all equitable and other questions that arise under this Plan. All disbursements by the Trustee shall be made upon, and in accordance with, the written instructions of the Plan Administrator. The decisions

of the administrator on all matters within the scope of its authority shall be final and binding upon all affected parties, including Participants and Beneficiaries.

APPENDIX G

IRS FORM 5624 (Rev. 5-91)

Employee Benefit Plan
Defined Benefit Plans Minimum Vesting Standards
(Worksheet Number 2A – Determination of Qualification)
[2000]

INSTRUCTIONS—All items must be completed. A "Yes" answer generally indicates a favorable conclusion is warranted while a "No" answer indicates a problem exists. Please use the space on the worksheet to explain any "No" answer. See Document 6390, Explanation Number 2A, for guidance in completing this form.

(The technical principles in this worksheet may be changed by future regulations or guidelines.)

[Items V & VII]

* * * *

V. Cash-Outs and Immediate Distributions [2031]

a. For purposes of determining an employee's accrued benefit that resulted from employer contributions, does the plan not disregard years of service performed for which the employee received a cash-out? [2032]

(If the answer is "Yes," skip to (f).)

b. If an involuntary cash-out, must the employee receive a distribution of the present value of the entire non-forfeitable benefit that resulted from employer contributions? [2033]

c. Are such distributions made because of the termination of the employee's participation in the plan? [2034]

d. Is the value of the employee's accrued benefit restored when the employee repays the full amount of the distribution as provided by regulations? [2035]

e. Does the plan disregard service only for which an employee receives payment? [2036]

f. Is the interest rate for valuing accrued benefits and determining the amount of distribution specified by the plan? [2037, 2038]

g. Does the plan satisfy the section 417 interest rate limitations as amended by section 1139 of TRA '86? [2037, 2038]

h. Does the plan determining the section 417 interest rate limitation as of the date of distribution or the first day of the plan year? [2039]

i. If the plan uses an interest rate in addition to the section 417 rate, does it provide that the present value of vested accrued benefits and the amount of distributions will be determined using the rate which results in the greatest benefit? [2040]

j. Are immediate distributions, where the present value of the vested accrued benefit has ever exceeded $3,500, precluded unless the participant consents? [2041]

* * * *

VII. Accrued Benefits [2045]

a. Insured Plans [2046]

i. Is the plan funded exclusively with insurance contracts satisfying the requirements of Code section 412(i)? *(If the answer is "Yes," complete only questions b(i) and f of this worksheet.)* [2047]

b. General [2048]

i. Does the plan provide neither a decrease in benefit payments to a participant (*or beneficiary*), not a decrease in a separated participant's rights to benefits, because of an increase in social security benefits? [2049]

ii. Does the plan provide for an accrual computation period for purposes of providing an accrued benefit? [2050]

iii. For purposes of benefit accrual, does the plan take into account every year required by DOL Regulations? [2051]

iv. If an employee may begin participation on a date other than the first day of an accrual computation period, does the plan provide for a partial year of participation as required by the DOL Regulations? [2052]

v. Does the plan not defer the accrual of benefits on behalf of an employee beyond the completion of 2 continuous years of service? [2053]

vi. If the plan defers accruals during a period of up to a participant's first 2 years of service, does the participant retroactivity accrue a benefit for that period after it ends? [2053]

c. Normal Retirement Benefit [2056]

i. Is the plan's accrued benefit always ascertainable? [2057]

ii. Is the plan's normal retirement benefit, as specified in the plan, equal to the plan's greatest early retirement benefit, or the benefit at normal retirement age, whichever is greater? [2058]

d. Methods [2060]

Once a plan satisfies the requirements of either i, ii, or iii, DO NOT complete the remaining items of section d.

i. 133-1/3 Percent Test

A. Is the accrued benefit that becomes payable at normal retirement age equal to the plan's normal retirement benefit? [2062]

B. Is the accrual rate in any given year under the plan no greater than 133-1/3 percent of the accrual rate in any prior year (*make appropriate adjustments for ancillary benefits*)? [2062]

If the answer is "Yes", DO NOT complete the remainder of section d.

ii. 3 Percent Test *(Use this test last for Unit Benefit Plans).*

A. In a fully integrated excess or offset plan, does the plan prohibit an early retirement benefit? *(If the answer is "No," use another test.)* [2062]

B. If the plan bases its benefits on average compensation, does it specify that the benefit is determined on the basis of compensation averaged over consecutive years of service, not more than 10, which yield the highest average? *(If the answer is "No," the 3 percent test cannot be met.)* [2062]

C. Is the accrual of plan benefits based on a "normal retirement benefit" which is figured assuming the earliest possible entry age under the plan? *(If no entry age is specified by the plan, use a 0.)* [2062]

D. If a participant does not accrue the "normal retirement benefit" by normal retirement age, are years of participation after normal retirement age

counted for purposes of meeting the requirement that the benefit accrued at the rate of at least 3 percent a year? [2062]

E. Does the plan specify the accrual of the "normal retirement benefit" will be a rate of at least 3 percent of the benefit each year of participation? [2062]

Check "Yes" if the 3 percent Test is satisfied. *(If all answers above are "Yes," this test is satisfied.)* If this test if satisfied, do not complete remainder of this section.

If the answer to B., C., and D. is "Yes," but the answer to E. if "No," then complete F.

F. Can it be demonstrated mathematically that the plan's "normal retirement benefit" accrues at a rate of at least 3 percent for each year of participation? In making this calculation, assume the earliest possible entry age under the plan. *(If no entry age is specified, assume 0.)* See the explanation for guidance in making your mathematical computations. [2062]

iii. Fractional Rule

A. If the plan benefit is based on average compensation, is the average based on compensation for a period no greater than the 10 years if service immediately before the date the benefit is determined? [2062]

B. Does the plan's benefit accrue at the same rate for all years? [2062]

If the answers to A. and B. are "Yes," this rule is satisfied.

C. Is it clear from the language of the plan that if a participant terminates service in year Y that the accrued benefit at Y is at least equal to the product of the plan's normal retirement benefit times a fraction of the actual years of participation from entry to Y over the years of service from entry to normal retirement age? [2062]

e. Coordinating Accrual Rules with Topheavy Rules

Do the accrual benefit rules properly coordinate with the topheavy rules? [2078]

f. Allocation of Accrued Benefits Between Employer and Employee Contributions

If the plan does not provide for employee contributions, DO NOT complete this section. [2080]

i. Does the plan maintain separate accounts for voluntary employee contributions? *(IF NO VOLUNTARY CONTRIBUTIONS ARE PERMITTED, CHECK "N/A")* [2081]

ii. Does the plan define the accrued benefit that is the result of employer contributions as the total accrued benefit less the accrued benefit that is the result of mandatory employee contributions? [2082]

iii. If the plan provides for mandatory employee contributions, does it correctly determine the accrued benefit that resulted from these contributions? [2083]

iv. is the interest credited to mandatory contributions calculated in accordance with section 411(c)(2)(C)? [2084]

APPENDIX H

GEORGIA-PACIFIC CORPORATION

LAW DEPARTMENT

DANIEL R. KOPTI,
Senior Counsel

133 Peachtree Street, N.E.
P.O. Box 105605
Atlanta, Georgia 30348-5605
Telephone (404) 652-7388
Facsimile (404) 584-1461

April 17, 1996

SENT VIA OVERNIGHT DELIVERY

Mr. Paul Holzman
National Center for Retirement Benefits, Inc.
666 Dundee Road, Suite 1200
Northbrook, IL 60062

Re: Mr. Jerry Lyons

Dear Mr. Holzman:

Your letter of March 18 to Ms. Becky Crockford has been referred to us for response.

We understand that Mr. Jerry Lyons is concerned about the interest rate used in calculating the lump sum distribution that he received in January 1993 from the Georgia-Pacific Corporation Salaried Employees Retirement Plan ("SERP"). He states in your letter that the Plan Administrator for the SERP must calculate the present value of normal retirement benefits by using an interest rate permitted unders Code Section 417(e) and IRS regulation 1.417(e)-1. He asserts that an incorrect interest rate was used in his case, causing a

reduction in his lump sum distribution. Your letter asks to have his SERP benefits recalculated and to have any additional amounts paid to him, along with interest.

Please be advised that the SERP is a special form of defined benefit plan known as a "cash balance" plan. As described in IRS Notice 96-8, a "cash balance" plan defines benefits for each employee by reference to the amount of the employee's hypothetical account balance. An employee's hypothetical account balance is credited with hypothetical allocations and hypothetical earnings determined under a formula selected by the employer and set forth in the plan. These hypothetical allocations and hypothetical earnings are designed to mimic the allocations of actual contributions and actual earnings to an employee's account that would occur under a defined contribution plan. Most cash balance plans are designed to permit, after termination of employment, a distribution of an employee's entire accrued benefit in the form of a single sum distribution equal to the employee's hypothetical account balance as of the date of the distribution.

According to the Plan Administrator's records, Mr. Lyons terminated employment in January 1991. He elected at that time to postpone receipt of his SERP benefits until a future date. During 1991 and 1992, his personal account was credited with hypothetical earnings (which the SERP calls "credit adjustments") equal to the average Pension Benefit Guaranty Corporation immediate annuity rate in effect for the previous calander year, plus 0.75%. The credit adjustment for 1991 was equal to 8.23%, while the credit adjustment for 1992 was equal to 7.71%, compounded monthly. In November 1992, Mr. Lyons requested a lump sum distribution of his personal account in the SERP. The

distribution took place in January 1993 and was equal to the hypothetical balance in his personal account of $36,109.15. Contrary to Mr. Lyon's assertion, his lump sum distribution was not calculated with reference to the present value of a normal retirement benefit or by using an interest rate that violated IRS requirements.

During the past several months we have exchanged several letters on the issue of whether Mr. Lyons qualifies as a "participant" in the SERP. As stated previously, the Supreme Court concluded in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) that former employees who have no reasonable expectation of returning to covered employment can qualify as "participants" in an employee benefit plan only if they have a colorable claim to vested benefits. We are not persuaded that Mr. Lyons' claim for SERP benefits, as expressed in your letter of March 18, constitutes a colorable claim to vested benefits. However, in the interest of alleviating Mr. Lyons' concerns and as an expression of good faith in this matter, the Plan Administrator for the SERP has decided to provide you with the summary plan description for the SERP. Also, if you would like a copy of the plan document, please send us a check in the amount of $28.75 to pay for photocopying charges (at the rate of 25 cents per page), and the document will be sent to you. The check should be made payable to "Georgia-Pacific Corporation Salaried Employees Retirement Plan". The furnishing of these documents does not constitute an admission by the Plan Administrator that Mr. Lyons is a "participant" in the SERP.

If you have any additional questions or comments regarding this matter, we request that you direct them to our attention.

Very truly yours,

/s/ Daniel R. Kopti
DANIEL R. KOPTI
Senior Counsel

Enclosure
93314

APPENDIX I

May 12, 1989

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
P.O. Box 941
Atlanta, Georgia 30370-000

GEORGIA-PACIFIC CORPORATION
133 PEACHTREE ST NE (BENEFITS-14)
ATLANTA, GA. 30303

District Office Code and Case Serial Number:
53809010

Name of Plan:
GEORGIA-PACIFIC CORPORATION SALARIED EMPLOYEES RETIREMENT PLAN

Application Form:
5300

Employer Identification Number:
930432081

Plan Number:
046

File Number:
580011644

Dear Applicant:

Based on the information supplied, we have made a favorable determination on your application identified above. Please keep this letter in your permanent records.

Continued qualification of the plan will depend on its effect in operation under its present form. (See section 1.401-1(b)(3) of the Income Tax Regulations.) The status of the plan in operation will be reviewed periodically.

The enclosed document describes the impact of Notice 86-13 and some events that could occur after you receive this letter that would automatically nullify it without specific notice from us. The document also explains how operation of the plan may affect a favorable determination letter, and contains information about filing requirements.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes.

All correspondence should be sent to the address shown above.

The enclosed Caveat Listing(s) should be considered a part of this determination letter.

If you have any questions, please contact EVELYN WAUGH at (404) 331-6971.

Sincerely,

/s/ Paul Williams
PAUL WILLIAMS
District Director

Enclosures:
Caveat Listing(s)
Publication 794
PWBA 515

CAVEAT LISTING FOR: GEORGIA-PACIFIC CORPORATION SALARIED EMPLOYEES RETIREMENT PLAN

PLAN NUMBER: 46

EMPLOYER IDENTIFICATION NUMBER: 930432031

This determination is subject to your adoption of the proposed amendments submitted in your or your representative's letter(s) dated 10/17/83.

The proposed amendments should be adopted on or before the date prescribed by the regulations under Code section 401(b). A copy of the executed amendments should be maintained in your file; however, it is not necessary to forward a copy to this office.

INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
P.O. BOX 2508
CINCINNATI, OH 45201

Date: May 05 1997

GEORGIA-PACIFIC CORPORATION
C/O LARA B. ROBINSON
C/O KING & SPALDING
191 PEACHTREE STREET
ATLANTA, GA 30303-1763

Employer Identification Number:
93-0432081

DLN:
585250004

Person to Contact:
Cindy Perry

Contact Telephone Number:
(513) 684-3957

Plan Name:
GEORGIA-PACIFIC CORPORATION
SALARIED EMPLOYEES RETIREMENT PLAN

Plan Number:
046

Dear Applicant:

We have made a favorable determination on your plan, identified above, based on the information supplied. Please keep this letter in your permanent records.

Continued qualification of the plan under its present form will depend on its effect in operation. (See section 1.401-1(b)(3) of the Income Tax Regulations.) We will review the status of the plan in operation periodically.

The enclosed document explains the significance of this favorable determination letter, points out some events that may affect the qualified status of your employee retirement plan, and provides information on the reporting requirements for your plan. It also describes some events that automatically nullify it. It is very important that you read the publication.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other federal or local statutes.

This determination is subject to your adoption of the proposed amendments submitted in your letter dated July 31, 1996. The proposed amendments should be adopted on or before the date prescribed by the regulations under Code section 401(b).

This determination letter is applicable for the amendment(s) adopted on December 30, 1994.

This determination letter does not apply to the merger, consolidation, or transfer of assets or liabilities of a plan described in Code section 6058(a) to, or with, another plan. A determination has not been made on whether the transaction met the requirements of the income tax regulations under Code section 414(1).

This plan satisfies the minimum coverage requirements on the basis of the average benefit test in section 410(b)(2) of the Code.

This plan satisfies the nondiscrimination in amount requirement of section 401(a)(4)-1(b)(2) of the regulations on the basis of a general test describe to the regulations.

GEORGIA-PACIFIC CORPORATION

This letter is issued under Rev. Proc. 93-39 and considers the amendments required by the Tax Reform Act of 1986 except as otherwise specified in this letter.

This plan satisfies the nondiscriminatory current availability requirements of section 1.401(a)(4)-4(b) of the regulations with respect to those benefits, rights, and features that are currently available to all employees in the plan's coverage group. For this purpose, the plan's coverage group consists of those employees treated as currently benefiting for purposes of demonstrating that the plan satisfies the minimum coverage requirements of section 410(b) of the Code.

This plan also satisfies the requirements of section 1.401(a)(4)-4(b) of the regulations with respect to the specific benefits, rights, or features for which you have provided information.

Except as otherwise specified this letter may not be relied upon with respect to whether the plan satisfies the qualification requirements as amended by the Uruguay Round Agreements Act, Pub. L. 103-465 and by the Small Business Job Protection Act of 1996 (SBJPA), Pub. L. 104-108, other than the requirements of Code section 401(a)(26).

We have sent a copy of this letter to your representative as indicated in the power of attorney.

If you have questions concerning this matter, please contact the person whose name and telephone number are shown above.

Eclosures:
Publication 794
Reporting & Disclosure Guide
for Employee Benefit Plans

Sincerely yours,
/s/ Paul M. Harrington
District Director